John Kolkka, d/b/a Kolkka Tables and Finnish-American Saunas, a Sole Proprietorship *and* Carpenters Union Local 2236, and the Bay Counties District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL–CIO. Cases 20–CA–27284, 20–CA–27287, 20–CA–27302–2, 20–CA–27312, 20–CA–27394, 20–CA–27398, 20–CA–27409, 20–CA–27415, 20–CA–27419, 20–CA–27422, 20–CA–27545, 20–CA–27570, 20–CA–27592, 20–CA–27606, 20–CA–27702, 20–CA–27756–1

August 27, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN, TRUESDALE, AND WALSH

On May 15, 1998, Administrative Law Judge James M. Kennedy issued the attached decision. The Respondent and the General Counsel each filed exceptions and supporting briefs, the Charging Party filed a brief joining in the General Counsel's brief on exceptions, and the Respondent filed a brief answering the General Counsel's exceptions.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] only to the extent consistent with this Decision and Order.

As discussed below, although we affirm the judge's decision in substantial part, we find merit in certain of the General Counsel's exceptions. We conclude, contrary to the judge, that the Respondent threatened to discharge, and unlawfully discharged 15 employees on May 13, 1996, because of their protected strike activity. In this regard we overrule *Kerrigan Iron Works, Inc.*, 108 NLRB 933 (1954), affd. sub nom. *Shopmen's Local 733 v. NLRB*, 219 F.2d 874 (6th Cir. 1955), cert. denied 350 U.S. 835 (1955), and cases following it to the extent they are incompatible with current case law. In addition, we disagree with the judge and find that the Respondent unlawfully suspended employee Efrain Ramos Tena on August 23, 1996, due to his exercise of Section 7 rights.

I. BACKGROUND

The Respondent is a sole proprietorship engaged in the design and production of metal furniture and saunas in Redwood City, California. John Kolkka is the owner, and he operates the business with Stephanie Kolkka, his wife. John Butters is the manager of furniture production. The Respondent employs 45 to 50 workers at the Redwood City location, who staff a day shift and an evening shift.

As more fully detailed in the judge's decision and below, a dispute between the Respondent and its production workers arose in mid-May 1996 regarding "piece rates" paid to employees.[3] In the wake of this dispute, 15 employees[4] did not appear for work on May 13 and 14. The judge found that because of this absence, which he found to be protected strike activity, on May 15 the Respondent unlawfully discharged 2 employees, unlawfully suspended a third, Efrain Ramos Tena, and issued unlawful warnings to the remaining 12. No exceptions were filed to the judge's findings and we adopt them.

As a result of the "piece rate" dispute, the employees contacted the Union in order to consider collective-bargaining representation. The Union initiated an organizing campaign in late May and the Board conducted an election on August 9. The Union won the election, and was ultimately certified by the Board as the employees' collective-bargaining representative in January 1997.

The judge found that during the organizing campaign, the Respondent committed numerous unfair labor practices designed to induce and coerce the employees to vote against the Union. The judge found that the Respondent violated Section 8(a)(1) of the Act by: threatening to close or move its business if the employees chose the Union; threatening to refuse to negotiate a collective-bargaining agreement if the Union was chosen; offering employment benefits to induce employees to abandon their support of the Union; threatening employees with unspecified retaliation if they selected the Union; soliciting grievances and impliedly promising to remedy them in order to undermine union support; and by threatening employees with loss of benefits and wage reductions if they voted in the Union. The judge also found that in

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In affirming the judge' finding that the Respondent did not unlawfully discharge the four Barajas brothers, we rely on the Respondent's good-faith, reasonable perception of its legal obligations under the Immigration Reform and Control Act of 1986 and the requirements of the Social Security Administration. Accordingly, we find it unnecessary to address the judge's interpretation of the relevant legal obligations. See sec. III,C,2 and D of the judge's decision.

The General Counsel excepted to the judge's failure to consider an alleged 8(a)(1) threat involving employee Rodrigo Cuevas' use of union stickers in the workplace. We find it unnecessary to pass on this allegation. Even if we were to find a violation and order a cease-and-desist remedy, it would merely be cumulative of the 8(a)(1) violation found by the judge concerning union stickers on Efrain Tena's toolbox and the judge's recommended remedy for this violation.

[3] All dates are in 1996 unless otherwise noted.

[4] We correct the judge's finding that 14 employees were involved in this incident.

late August, after the Union won the election, the Respondent violated Section 8(a)(1) by ordering employee Tena to remove union stickers from his own toolbox. The Respondent did not file exceptions to these findings and we adopt them.[5]

We also affirm the judge's findings that the Respondent violated Section 8(a)(5) and (1) by unilaterally changing certain working conditions following the election, and by refusing in early 1997 to provide the Union with requested information relevant to collective bargaining. Although the Respondent excepted to the judge's findings, it relied solely on its then-pending court challenge to the Board's Order requiring the Respondent to bargain with the Union based on the Board's certification of the Union as the employees' exclusive collective-bargaining representative. The court, however, has since enforced the Board's bargaining order. *NLRB v. Kolkka*, 170 F.3d 937 (9th Cir. 1999), enfg. 323 NLRB 958 (1997). Accordingly, we find no merit in these exceptions.

The judge dismissed several other unfair labor practice allegations, and the General Counsel filed exceptions to some of the dismissals. For the reasons discussed below, we find merit in these exceptions concerning two matters: the May 13 mass discharge of the 15 employees who engaged in a "piece-rate" wage protest, and the August 23 disciplinary suspension of employee Tena.

II. THE "PIECE-RATE" INCIDENT

A number of the Respondent's production workers were paid on a "piece-rate" basis, i.e., the Respondent would pay a worker a specific "price" for production of a furniture item. In many cases, the employees did not know the exact prices of the items they produced, and the Respondent traditionally was not forthcoming in making the prices available. This led to the employees' suspicion that the prices the Respondent paid them for completed work were not consistent, and that the prices were changed periodically without notice. The price issue had been a point of friction between the employees and the Respondent for at least 2 years prior to May 1996.

Friday, May 10, was a payday, and the price problem came up again at the beginning of the evening shift. A group of employees, thinking that their piece-rate paychecks were short, demanded to speak to John Kolkka about it. Kolkka did not agree to talk to them, but he conferred for 2-1/2 hours with Manager John Butters and a supervisor about the matter. During this time the employees stood by their equipment without working and waited for the conference to end. Ultimately, the supervisor offered to provide some information concerning prices, but the employees decided it was insufficient. They told the supervisor they were going home, and he acceded. No production work was done that night.

Over the weekend, word of what had happened spread to day-shift employees. On Monday, May 13, the day-shift workers showed up at the Respondent's facility at 8 a.m., the usual time for work. They did not go to work, however. They demanded to speak with John Kolkka, and made clear that they would not begin work until a meeting had been arranged. Kolkka had not planned to be at the plant that day. After Butters called, Kolkka arrived at about 10 a.m. By that time, the group of employees demanding to speak with him had grown to about 45; apparently it included some off-duty, evening-shift workers.

The employees followed Kolkka to an area just outside the plant office, insisting that he meet with them en masse. John and Stephanie Kolkka, Butters, and employee Rigoberto Moreno, who was perceived as a leader of the employees, conferred inside the office, while the rest of the employees waited outside. After a time, Stephanie Kolkka emerged and spoke to the group in an angry tone. Employee Tena tape recorded what she said, and the audio recording was transcribed and placed in evidence at the hearing. The following is the relevant portion of that transcript:

> Stephanie Kolkka: Okay you have a choice. I will talk to you one at a time, I'm not gonna to talk to you like this, if you don't want to do that, you can go home and I'm closing down the shop. You understand? You understand? I know you understand George. . . . Okay, so, that is your choice. So, if you want to talk in your little mob scene, I'm gonna to close down the shop and I will do it. You want to talk to me one at a time, I will do it. I expect the rest of you to go back to work while I am talking to the other people. If you're not willing to do that, I will close down the shop. So, what do you want to do? (inaudible male voice, approximately 4–5 words). Because you speak English, that's why.
>
> . . . .
>
> [pause during which inaudible background discussion occurs]
>
> Stephanie Kolkka: Would you please repeat this please? I will talk to everyone one at a time and I expect other people to go back to work [pause during which translation presumably occurs]. If they are not willing to do that, then I am closing down the shop [pause during which translation presumably occurs] [followed by unintelligible voices speaking

[5] At the hearing the Respondent conceded the 8(a)(1) violations committed during and after the organizing campaign.

> together, some Spanish, some English]. I will not be brow-beaten like this, and you're gonna lose your jobs, you're gonna lose your job over it, and I am not fucking around.
>
> [Partially intelligible discussion occurs].
>
> John Kolkka: Okay, one at a time, because everybody's gotta a little different situation here. You guys. Some of you guys have a problem with your paychecks. I know some you guys don't have a problem with your paychecks. The other guys are just hanging around for the party. Okay.
>
> Stephanie Kolkka: It's no game and it is no party. And I will close down the shop and you will lose your jobs if you do not do what I tell you to do, and I am not fucking around here. So, it's up to you, one at a time, or nothing. And I expect the rest of you to go back to work while I am talking to the other people. And I want to talk to you first.
>
> [Person believed to be Efrain Ramos Tena asks in Spanish if David [Palacios] can translate; a translation seems to begin but John Kolkka interrupts.]
>
> John Kolkka: The guys that want to go, they go. The guys that stay, stay. . . . One at a time or nothing.
>
> Efrain Ramos Tena: Nothing.

At that point, 15 employees left the plant, and about 30 decided to go to work.

On Wednesday, May 15, the 15 employees returned to the plant seeking to go to work. At that time, the Respondent formally discharged Moreno and Guillermo Cortez, another perceived employee leader. Tena was suspended for 3 days, and the other 12 employees received warnings before being permitted to return to work. As indicated above, the judge properly found these actions unlawful, and the Respondent has not filed exceptions to his findings.

In addition to these unlawful warnings, discharges, and suspension, the General Counsel alleges that Stephanie Kolkka's threatening statements on May 13 interfered with the employees' exercise of Section 7 rights, in violation of Section 8(a)(1). We agree, for the reasons that follow.

The General Counsel further contends that by Stephanie Kolkka's statements, the Respondent effectively discharged the 15 workers who subsequently left the premises. The General Counsel alleges that the discharges were unlawful, and that accordingly, these employees were entitled to backpay for the time they were not permitted to work between May 13 and 15. The judge rejected this contention, finding that the employees who left the plant, like their coworkers on Monday and the previous Friday, had voluntarily withheld their labor. Thus, in the judge's view, the 15 were not discharged on Monday; rather, they were continuing a strike off the premises, which had begun earlier within the plant. Relying on the principle that an employer may require employees who concertedly refuse to work to conduct their strike off the property, the judge interpreted the Kolkkas' statements to the employees outside the office as simply a lawful exercise of that right. He also indicated that, at worst, these statements constituted permissible "tactical threats" designed to get the employees back to work, rather than a discharge.

The issue here, then, is the proper characterization of the nature and effect of Stephanie Kolkka's statements. We reject the judge's analysis in this regard. In agreement with the General Counsel, we find that the 15 employees were not only unlawfully threatened by the statements, but were also unlawfully discharged.

The Board recently summarized the applicable legal principles in *North American Dismantling Corp*., 331 NLRB 1557 (2000):

> The Board has held that the fact of discharge does not depend on the use of formal words of firing. *Hale Mfg. Co.*, 228 NLRB 10, 13 (1977), enfd. 570 F.2d 705 (8th Cir. 1978). It is sufficient if the words or action of the employer "would logically lead a prudent person to believe his [her] tenure has been terminated." *NLRB v. Trumbull Asphalt Co.*, 327 F.2d 841, 843 (8th Cir. 1964).

See also *Flat Dog Productions,* 331 NLRB 1571 (2000); *Dublin Town, Ltd.*, 282 NLRB 307, 308 (1986); and *Ridgeway Trucking Co.*, 243 NLRB 1048 (1979), enfd. 622 F.2d 1222 (5th Cir. 1980). Under this analysis, the determination of whether there was a discharge is judged from the perspective of the employees, and is based on whether the employer's statements or conduct "would reasonably lead the employees to believe that they had been discharged." *NLRB v. Hilton Mobile Homes*, 387 F.2d 7, 9 (8th Cir. 1967). See *Brunswick Hospital Center*, 265 NLRB 803, 810 (1982)("In determining whether or not a striker has been discharged, the events must be viewed through the striker's eyes and not as the employer would have viewed them"). Moreover, the employer will be held responsible when its statements or conduct create an uncertain situation for the affected employees:

> If [the employer's] . . . acts created a climate of ambiguity and confusion which reasonably caused strikers to believe that they had been discharged or, at the very least, that their employment status was questionable because of their strike activity, the burden of the results of that ambiguity must fall on the employer.

North American Dismantling Corp., supra at fn. 4, quoting from *Brunswick Hospital Center*, supra.

Here, Stephanie Kolkka's statements to the striking employees outside the plant office were not limited to stating that the Respondent would not bargain with them en masse, that it instead would deal with each of them individually. Rather, she also stated that in the meantime they should either get back to work or go home. Further, she identified the consequences if the employees did not follow her instructions. Thus, she referred to "closing down the shop" four times, and twice emphatically stated that the employees would lose their jobs if they did not cooperate. Thus, for example, at the end of her speech, she said: ". . . I will close down the shop and you will lose your jobs if you do not do what I tell you to do, and I am not fucking around here. So, it's up to you, one at a time or nothing."

Given these statements, we find that it was reasonable for the 15 employees who chose not to abandon their concerted protest to believe that their choice meant they were discharged for engaging in protected concerted activity, i.e., for continuing their concerted protest and failing to "get back to work or go home."[6] At the very least, it was reasonable for them to perceive their employment status as questionable. John Kolkka, although speaking in a more temperate manner, appeared to endorse his wife's remarks. Certainly he neither disavowed them, nor clarified any confusion her remarks may have created. Accordingly, we find that the 15 employees who left on May 13 were discharged. By threatening to discharge them, and by discharging them because of their protected protest concerning piece-rate prices, the Respondent violated Section 8(a)(1).

In finding to the contrary, the judge relied in significant part on an early line of cases where the Board characterized discharge threats made to strikers as a lawful management tactic in certain circumstances. The most prominent of these cases is *Kerrigan Iron Works, Inc.*, 108 NLRB 933 (1954), affd. sub nom. *Shopmen's Local 733 v. NLRB*, 219 F.2d 874 (6th Cir. 1955), cert. denied 350 U.S. 835 (1955). In *Kerrigan*, a divided Board agreed that the employer's threat to terminate strikers who did not return to work by a certain date was "an unlawful strike-breaking technique . . . designed to coerce the strikers to abandon the strike." 108 NLRB at 935. Nevertheless, a Board majority concluded that the unlawful threat did not amount to an unlawful discharge of the strikers, because after the stated date the employer reinstated strikers who wished to return to work. Id. As later explained in *Crookston Times Printing Co.*, 125 NLRB 304, 317 (1959), the Board in *Kerrigan* and other cases essentially:

> concluded that in strike situations employers go through the motions and state that they are terminating or discharging the strikers for the purpose of breaking the strike or dissuading the employees from striking but without meaning to refuse reinstatement when requested by the employees. Under this type of tactical discharge there is customarily found to be a violation of Section 8(a)(1) of the Act since the employer has interfered with the exercise by the employees of their rights under Section 7; however, the determination of whether or not there has been an actual discharge and a violation of Section 8(a)(3) is dependent upon the particular facts and whether the employer refuses to reinstate the strikers upon request and the reason therefor. [Citations omitted.]

Thus, under the *Kerrigan* line of cases, in determining whether an unlawful threat of discharge is a tactical maneuver or an actual, unlawful discharge, the Board focused on the employer's intent behind the threat, manifested by its subsequent conduct, particularly its willingness to reinstate strikers who wished to return to work. Id.

In essence, the *Kerrigan* line of precedent holds that an employer may unlawfully threaten discharge to bluff strikers back to work, or to cow them from striking in the first instance, as long as the employer later reinstates strikers if the ruse fails. In our view, these cases improperly allow an employer to use an admittedly unlawful threat to intimidate employees in the exercise of their right to strike. Such a result is clearly inimical to the exercise of Section 7 rights and therefore inconsistent with the purposes and policies of the Act.[7]

Further, the *Kerrigan* analysis suffers from a basic misconception: the belief that the meaning of the employer's unlawful threat of discharge of strikers can be further assessed when the employees attempt to return to work following the strike. However, the Board has con-

[6] We reject our dissenting colleague's finding that this was not a threat of discharge for striking. Although they were on the plant premises at the time, Stephanie Kolkka gave the employees only two choices: go back to work or go home. Whatever their right to continue their concerted protest on the premises, see *Cambro Mfg. Co.*, 312 NLRB 634, 635–636 (1993), the employees surely had a protected right to continue their protest outside the plant. Thus, contrary to our dissenting colleague, "going home" was not the only alternative to what the employees were doing. In light of the threats of plant closure and discharge, the employees reasonably perceived the options that Stephanie Kolkka presented to them as a Hobson's choice of "either continuing to work or forgoing rights protected by the Act." *Intercon I,* 333 NLRB 223 (2001), quoting *Multimatic Products,* 288 NLRB 1279, 1348 (1988).

[7] As the dissenting Board Members in *Kerrigan* pointed out, later reinstatement of tactically discharged employees "does not alter the illegal character of the original discharge, but only eliminates the need for a reinstatement order for them." 108 NLRB at 938.

sistently ruled over the last 20 years that discharged strikers have no obligation to request reinstatement. As stated in *Naperville Ready Mix*, 329 NLRB 174, 185 (1999), enfd. 242 F.3d 744 (7th Cir. 2001), citing *Abilities & Goodwill*, 241 NLRB 27 (1979), enf. denied on other grounds 612 F.2d 6 (1st Cir. 1979):

> The fact that the employees were then on strike does not preclude a finding of unlawful discharge, with entitlement to backpay commencing at that point. When strikers are unlawfully discharged, they are not required to request reinstatement since, by discharging them, the employer has signaled that he does not regard them as strikers entitled to reinstatement upon request.

Thus, if striking employees believe, as a result of the employer's threat of discharge, that they have been discharged, they would quite likely not request reinstatement. And if they in fact do not request reinstatement, there is no way to meaningfully evaluate, under the "tactical discharge" analysis, the employer's subsequent failure to reinstate them.

Finally, the analytical framework of the *Kerrigan* cases is also incompatible with the "reasonable employee" analysis applied by the Board in *North American Dismantling*, supra, and the other cases cited above. The former focuses on the employer's intent, to ascertain whether an unlawful discharge threat is sufficiently serious to constitute an unlawful discharge. The latter determines whether an unlawful discharge has occurred based on the striker's reasonable understanding of the employer's conduct, even where the employer may not have actually intended to discharge the employee. See *Dublin Town Ltd.*, 282 NLRB at 311. In our view, the "reasonable employee" analysis, which focuses on what employees would reasonably believe the employer meant by its words and conduct, is more consistent with the Act's purpose of protecting employee Section 7 rights, and is therefore the proper approach. Accordingly, to the extent the *Kerrigan* "tactical discharge" line of cases still survives,[8] we overrule those cases.[9]

Even were we to apply the *Kerrigan* precedent, however, we would reach the same result in this case. When the 15 strikers attempted to return to work on May 15, the Respondent formally discharged 2 of them, suspended another for 3 days, and issued disciplinary warnings to the remaining 12 before reinstating them. We agree with the judge that all of these actions violated the Act. Thus, the Respondent's subsequent conduct did not consist simply of reinstating those who wished to return; rather, the Respondent compounded its discharge threats with these additional unfair labor practices against the strikers. Further, the judge's findings indicate that the Respondent's actual perception was that the strikers had abandoned their jobs on May 13, and that it was a matter of the Respondent's choice on May 15 whether to reemploy them or not. This does not suggest that the May 13 discharge threats were a tactical measure. Rather, it indicates that the Respondent in fact considered the strikers terminated when they walked out.

III. TENA'S AUGUST SUSPENSION

During the morning of August 23, 2 weeks after the Board election, Production Manager Butters was in employee Tena's work area. He noticed several union stickers on the toolbox Tena used. Butters mistakenly believed that the toolbox was company property; in fact, it belonged to Tena. Butters began removing the stickers himself, and then he ordered Tena to remove the rest.[10] Tena refused, insisting that the toolbox was his personal property. Butters directed him three more times to remove the stickers, and Tena refused each time. Reacting to what he perceived as Tena's excessive hostility,[11] Butters told him he was suspended and to go home. Tena refused to leave. Butters called the police, who escorted Tena from the property. Tena's suspension for insubordination was for the remainder of that day. According to Butters, the entire incident, including Tena's departure, occurred over a period of about 15 minutes.

As mentioned in the "Background" section above, the judge found that Butters' demand that Tena remove the union stickers from his personal toolbox violated Section 8(a)(1). Nevertheless, the judge found that Butters' subsequent suspension of Tena for refusing to comply with his unlawful order to remove the stickers did not violate Section 8(a)(3). The judge found that Tena had re-

[8] The *Kerrigan* line of cases has apparently fallen into disuse. It was last cited in *Cargill Poultry Co.*, 292 NLRB 738 fn.10 (1989), and there simply to describe an employer's legal position. It was last applied in finding no discharge in *Highland Plastics, Inc.*, 256 NLRB 146, 157 (1981). It is thus apparent that over the past two decades, the *Kerrigan* analysis has been effectively superceded by the "reasonable employee" rationale and the doctrine set forth in *Abilities and Goodwill*.

[9] Our dissenting colleague suggests that our decision to overrule the *Kerrigan* cases is "injudicious." However, as we have explained above, this line of cases is inconsistent with the Act's policies and purposes; incompatible with later, better-reasoned precedent; and has fallen into disuse. Nevertheless, the judge relied on it as if it were sound case law. In these circumstances, it is entirely appropriate that we overrule these cases in the interest of consistency and coherence of Board precedent.

[10] Butters' own August 23 memorandum to Tena's personnel file, in evidence, states that Butters first removed some stickers himself.

[11] The judge found that Tena "hotly" and "defiant[ly]" refused Butters' orders to remove the stickers, and that Butters deemed Tena's response to be excessively hostile. There are no exceptions to these findings and we therefore adopt them. However, as discussed infra, there is no direct evidence in the record that Tena's response included any threats, profanity, or other remarks demeaning Butters as a supervisor.

sponded in a defiant way by repeatedly refusing to comply with Butters' order to remove the stickers; that refusing to comply with a direct order as he did was insubordinate; that Tena also refused to leave the plant when directed to do so by Butters; and that Tena's insubordination outweighed Butters' interference with Tena's Section 7 rights. We reverse.

As an initial matter, we find that Tena's refusal to comply with Butters' unlawful order to remove the stickers did not constitute "insubordination" justifying discipline. As stated in *London Memorial Hospital*, 238 NLRB 704, 709 (1978):

> An employer is not free to evade liability through the device of utilizing a rule prohibiting activity protected by Section 7 of the Act and by then basing its discipline on the fact that the employee has violated the rule, thereby being insubordinate . . . .

See also *Simplex Wire & Cable Co.*, 313 NLRB 1311, 1315 (1994); *Cooper Tire and Rubber Co.*, 299 NLRB 942, 953 (1990) (refusal to comply with unlawful rule or order prohibiting activity protected by Section 7 does not constitute insubordination justifying discipline).[12]

Here, as indicated above, the judge found that Butters' order to remove the stickers interfered with Tena's Section 7 rights, in violation of Section 8(a)(1) of the Act. The Respondent has not excepted to this finding and we adopt it. Further, we perceive nothing in the manner of Tena's refusal to comply with Butters' unlawful order that would constitute insubordination. Contrary to the judge, we do not find it significant that Tena repeatedly refused to comply with Butters' unlawful order each time Butters repeated that order. A refusal to comply once with an unlawful order to cease engaging in Section 7 activity is not transformed into insubordination simply because the refusal is repeated each time the unlawful order is reiterated. Finally, while Tena's successive refusals put him in conflict with a supervisor, there is no direct evidence in the record that Tena made any threatening comments or gestures, directed any profanity at Butters, or made any other remarks demeaning Butters as a supervisor.[13] Accordingly, we find that Butters' suspension of Tena for refusing to remove the stickers was unlawful.

Moreover, even assuming arguendo, as the judge found, that the manner of Tena's refusal to comply with Butters' unlawful order did constitute insubordination, we find that Tena did not thereby forfeit the protection of the Act. In evaluating Tena's behavior, the judge failed to accord sufficient weight to the Respondent's unlawful conduct. When an employee's purported insubordination relates to his exercise of protected rights and is provoked by the employer's unfair labor practices, the employee's conduct must be evaluated by comparing "the seriousness of the employer's unlawful conduct with the extent of the employee's reaction." *Caterpillar, Inc.*, 322 NLRB 674, 678 (1996), decision vacated pursuant to a settlement by unpublished order dated March 19, 1998.[14] "'The more extreme an employer's unlawful provocation the greater would be the employee's justified sense of indignation and the more likely its excessive expression.'" *Caterpillar*, 322 NLRB at 678, quoting *NLRB v. M. & B. Headwear Co.*, 349 F.2d 170, 174 (4th Cir. 1965).

Here, we find that Tena's refusal to comply with Butters' order, however it was perceived by Butters, was entirely understandable. As discussed above, the immediate provocation for Tena's response was Butters' abuse of his personal property by removing stickers from his toolbox and Butters' unlawful order directing him to remove the remaining stickers. Such direct interference with an employee's fundamental Section 7 rights is a serious violation of the Act. See, e.g., *Escanaba Paper Co.*, 314 NLRB 732 (1994), enfd. 73 F.3d 74 (6th Cir. 1996). Further, it is also, in our view, highly likely to provoke a hostile or defiant response. The toolbox was Tena's personal property, after all, and he had a legally protected right to put union stickers on it. While Butters believed—albeit mistakenly and despite Tena's protestations—that the toolbox was company property, this does not minimize the impact his conduct would reasonably tend to have on an employee.

Moreover, Respondent's earlier unlawful conduct also cannot be ignored in evaluating Tena's response. Thus, as discussed above, on May 13, Tena and 14 of his coworkers were unlawfully discharged for engaging in a protected protest over their employment conditions. When Tena tried to return to work with the others on May 15, the Respondent unlawfully gave him a 2-day suspension before accepting him back. As outlined above, from mid-May until the August 9 election, the

[12] *Grand Rapids Die Casting*, 279 NLRB 662, 667 (1986), cited by the Respondent, is distinguishable. In that case, the employer simply ordered the union steward to return to work. Although the steward was engaged in processing a grievance at the time, the judge found the evidence insufficient to establish that the steward was not really needed back on the job or that the order was given to provoke his refusal. Id. at fn. 22. Under these circumstances, the judge found that the steward's refusal to return to work was insubordinate, and the Board adopted the judge's finding.

[13] Cf. *Felix Industries, Inc. v. NLRB*, 251 F.3d 1051 (D.C. Cir. 2001), remanding 331 NLRB 144 (2000) (court remanded for Board to further consider whether terminated employee lost protection of the Act by denouncing supervisor in obscene, personally denigrating, and insubordinate terms).

[14] See *Caterpillar, Inc.*, 332 NLRB 1116 (2000).

Respondent also committed numerous other unfair labor practices designed both to restrain Tena and the other employees from exercising their rights and to coerce them to vote against the Union. In this context, it is reasonable to conclude, and we do, that Tena's refusal to comply with Butters' unlawful order was provoked by these earlier unfair labor practices as well as by the unlawful order itself.

In sum, we find that Tena's refusal to comply with Butter's order, even assuming that refusal was insubordinate, did not deprive Tena of the protection of the Act. And we so find regardless of whether Tena's refusal is balanced solely against Butters' conduct on August 23 or against both that conduct and the Respondent's earlier unfair labor practices.

As indicated above, in finding no violation, the judge also considered Tena's refusal to comply with Butters' direction to leave the plant following his suspension. However, Tena's refusal to leave the plant was clearly provoked by the Respondent's unlawful order to remove the stickers and his unlawful suspension.[15] Contrary to the judge, we therefore find that Tena's refusal to leave the plant also did not deprive him of the Act's protection. See *Cone Mills Corp*., 298 NLRB 661, 667 (1990).

For all the foregoing reasons, we conclude that Tena's suspension violated Section 8(a)(1) of the Act. In light of this conclusion, we find it unnecessary to address the General Counsel's allegation that the suspension also violated Section 8(a)(3), since a finding of that additional violation would not materially affect the remedy. See, e.g., *NLRB v. Burnup & Sims*, *Inc*., 379 U.S. 21 (1964); *Webco Industries*, 327 NLRB 172 (1998), enfd. 217 F.3d 1306 (10th Cir. 2000); *Durham Transportation*, 317 NLRB 785, 786–787 (1995).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set out in full below, and orders that the Respondent, John Kolkka, d/b/a Kolkka Tables and Finnish-American Saunas, a sole proprietorship, Redwood City, California, his agents, successors, and assigns, shall

1. Cease and desist from

(a) Warning, suspending, discharging, or otherwise disciplining employees who engage in concerted protected activity for their mutual aid and protection, such as participating in a lawful strike to protest working conditions.

(b) Threatening that employees will lose their jobs because of their participation in such concerted protected activity.

(c) Threatening to close or move the business in the event the employees select the Union as their collective-bargaining representative.

(d) Threatening to refuse to negotiate a contract with the Union in the event it became the employees' Section 9(a) representative, thereby telling employees that having a collective-bargaining agent is a futile act.

(e) Offering employees promotions and/or raises to induce them to abandon their support for the Union and to induce them to persuade employees to vote against union representation.

(f) Threatening employees with unspecified reprisals if they select the Union as their representative.

(g) Soliciting grievances and thereby impliedly promising to correct them in order to undermine the employees' support for the Union.

(h) Telling employees that they would lose some of their current benefits or suffer wage reductions if the Union became their representative.

(i) Ordering employees to remove union stickers from their personal property such as privately owned toolboxes.

(j) Unilaterally, and without notice to the Union and without giving it the opportunity to bargain, changing significant working conditions, such as the release time of paychecks or other mandatory bargaining subjects.

(k) Refusing to provide to the Union, after the Union makes a proper request, information relevant and necessary to the Union's performance of its duties as the collective-bargaining representative of its employees, such as: plans the Respondent may have regarding subcontracting work; a copy of any company policy handbook; a list of current bargaining unit employees, including their wage rates, job classifications, dates of hire, and benefits; and company policies regarding job descriptions, terminations, layoffs, promotions, vacations, sick leave, scheduled pay increases for 1997, and merit or bonus pay plans.

(l) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Rigoberto Moreno full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

[15] As discussed above, it is reasonable to conclude that Tena's refusal to leave was also provoked by Respondent's earlier unlawful conduct.

(b) Make whole Rigoberto Moreno, Guillermo Cortez, Rodrigo Cuevas, Raul Alaniz, Roberto Barajas, Sergio Barajas, Carlos Bracamontes, Jose Chavez, Jesus Cortez, Jorge Garcia, Jorge Rocabino, Mario Torres Sandoval, Jose L. Tena, Efrain Ramos Tena, and Luis Vega for any loss of earnings and other benefits suffered as a result of their unlawful discharges on May 13, 1996, in the manner set forth in the remedy section of the decision.

(c) Make Efrain Ramos Tena whole for any loss of earnings and other benefits suffered as a result of his discriminatory suspensions of May 15–17 and August 23, 1996, in the manner set forth in the remedy section of the decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to: the unlawful discharges of Rigoberto Moreno and Guillermo Cortez; the unlawful discharges of, and the unlawful warnings given to, Rodrigo Cuevas, Raul Alaniz, Roberto Barajas, Sergio Barajas, Carlos Bracamontes, Jose Chavez, Jesus Cortez, Jorge Garcia, Jorge Rocabino, Mario Torres Sandoval, Jose L. Tena, and Luis Vega; and the unlawful discharge and unlawful suspensions of Efrain Ramos Tena; and within 3 days thereafter notify the employees in writing that this has been done and that the discharges, suspensions, and/or warnings will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of payment due under the terms of this Order.

(f) Immediately provide the Union with plans the Respondent may have regarding subcontracting work; a copy of any company policy handbook; a list of current bargaining unit employees, including their wage rates, job classifications, dates of hire, and benefits; and company policies regarding job descriptions, terminations, layoffs, promotions, vacations, sick leave, scheduled pay increases for 1997, and merit or bonus pay plans.

(g) Immediately rescind its practice of releasing paychecks at 4 p.m. on paydays and return to its previous practice of releasing them at 2:30 p.m.

(h) Within 14 days after service by the Region, post at its office in Redwood City, California, copies of the attached notice marked "Appendix."[16] Copies of the notice, in English, Spanish or any other foreign language deemed appropriate by the Regional Director for Region 20, on forms provided by the Regional Director, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since May 13, 1996.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps Respondent has taken to comply.

CHAIRMAN HURTGEN, dissenting in part.

I agree that the employees engaged in a strike on May 13.[1] My colleagues find that Respondent unlawfully threatened to discharge them for striking, and that the threat was tantamount to an unlawful discharge. I disagree on both counts.

First, the threat was not a threat to discharge them for striking. The threat was to discharge them if they continued their conduct of "sitting in" on premises in order to force a group meeting with Respondent. As discussed above in footnote 1, they had no statutory right to remain on the premises. And, although they had a Section 7 right to seek a group meeting, Respondent had no obligation to comply with the request.[2] The employees nonetheless remained on the premises in order to force compliance with their demand. Respondent's threat to terminate the employees if they persisted in their conduct was thus not unlawful.

My colleagues note that the Respondent gave the employees the alternative of "going home." From this, my colleagues infer that Respondent took away the lawful alternative of protesting outside the plant. In my view, this is quite a stretch. "Going home" was the alternative to what the employees were doing, i.e., physically occu-

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] However, the strikers did not have a right to remain on Respondent's property. Thus, if Respondent had simply ordered them to leave, that order would have been lawful.

[2] The Union was not yet the representative, and thus there was no obligation to deal collectively with the employees.

pying the plant and performing no work. There is not the slightest suggestion that a protest outside the plant would be punished with discharge.

Further, even assuming arguendo that Respondent threatened to discharge the employees for striking, and further assuming arguendo that the threat was unlawful under Section 8(a)(1), an unlawful threat is not the same as an unlawful discharge. Nearly 50 years of Board and court law support my view.[3] My colleagues would overrule this body of law. I would not do so.

In the first place, no party seeks to overrule this body of law, and thus the issue has not been litigated or briefed. It is injudicious to overrule precedent and adversely affect a party in these circumstances.

Second, there is no empirical showing that current law has led to instability or injustice. Absent such a showing, there is no warrant for such a change by an administrative agency.

Third, the current law is not unjust. In the face of such a threat, the employees can continue their strike. If the strike is at least partially in protest of the threat, the strikers are unfair labor practice strikers and cannot be replaced. Further, if the threat becomes a reality, i.e., if they are discharged, they can file a charge. Finally, they can also cease their strike, and promptly file a charge and challenge the threat.

The instant case disproves the proposition that a threat to discharge is a discharge. Respondent threatened employees with discharge but Respondent did not say that they were discharged, and (with two exceptions), they were not in fact discharged.[4] Accordingly, I would not convert a 8(a)(1) threat into a discharge. To do so is contrary to law, logic, and common sense.

Concededly, there are cases where employer conduct reasonably leads employees to believe that they have been discharged. In such circumstances, I would find the discharge. Thus, in *Flat Dog Productions*, 331 NLRB 1571 (2000), the employer told employees that they were terminated for not ending their strike, and the employer later referred to these strikers as former employees. I agreed that there was a discharge. By contrast, I dissented in *North American Dismantling*, 331 NLRB 1557 (2000). In that case, the employer gave the employees the option of working for him at a rate below that which they sought *or* seeking other employment. The employees then voluntarily left the premises. In my view, they were not discharged.

In the instant case, the Respondent threatened to discharge the employees if they continued to remain on the premises in order to force a meeting with Respondent. The employees promptly left the premises, and thus the condition precedent for discharge did not occur. Accordingly, there was no reason for the employees to believe that they had been discharged.

My colleagues say that an employee who believes that he has been discharged would not likely seek reinstatement. The speculation is unwarranted. Indeed, in the instant case, the employees believed that they were discharged (according to my colleagues) and yet they sought to come back to work.

[3] *Kerrigan Iron Works, Inc.*, 108 NLRB 933 (1954), affd. sub nom. *Shopmen's Local. 733 v. NLRB*, 219 F.2d 874 (6th Cir. 1955).

[4] I agree that the actual discharges were unlawful.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT warn, suspend, discharge, or otherwise discipline employees who engage in concerted protected activity for their mutual aid and protection, such as participating in a lawful strike to protest working conditions.

WE WILL NOT threaten that employees will lose their jobs because of their participation in such concerted protected activity.

WE WILL NOT threaten to close or move the business because you selected a union as your collective-bargaining representative.

WE WILL NOT threaten to refuse to negotiate a contract with Carpenters Union Local 2236, and the Bay Counties District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL–CIO, which is now your exclusive collective-bargaining representative, and WE WILL NOT tell employees that having a collective-bargaining agent is a futile act.

WE WILL NOT offer employees promotions and/or raises to induce them to abandon their support for the Union.

WE WILL NOT threaten employees with unspecified reprisals because they selected the Union as their representative.

WE WILL NOT solicit grievances from our employees and imply that we will correct them in order to undermine your support for the Union.

WE WILL NOT tell employees that they will lose some of their current benefits or suffer wage reductions because they selected the Union as their representative.

WE WILL NOT order employees to remove union stickers from their personal property such as privately owned toolboxes.

WE WILL NOT**,** without giving the Union the opportunity to bargain, change significant working conditions, such as the release time of employees' paychecks, or any other mandatory bargaining subjects.

WE WILL NOT refuse to provide to the Union, when the Union makes a proper request, information relevant or necessary to the Union's performance of its duties as your collective-bargaining representative, such as plans we may have regarding the subcontracting of work; copies of any company policy handbook; a list of current bargaining unit employees, including their wage rates, job classifications, dates of hire, and benefits; company policies regarding job descriptions, terminations, layoffs, promotions, vacations, sick leave, scheduled pay increases for 1997, and merit or bonus pay plans.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Rigoberto Moreno full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make whole Rigoberto Moreno, Guillermo Cortez, Rodrigo Cuevas, Raul Alaniz, Roberto Barajas, Sergio Barajas, Carlos Bracamontes, Jose Chavez, Jesus Cortez, Jorge Garcia, Jorge Rocabino, Mario Torres Sandoval, Jose L. Tena, Efrain Ramos Tena, Luis Vega for any loss of earnings and other benefits resulting from their discharges, plus interest.

WE WILL make Efrain Ramos Tena whole for any loss of earnings and other benefits resulting from his unlawful suspensions of May 15-17 and August 23, 1996, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Rigoberto Moreno and Guillermo Cortez; to the unlawful discharges of, and the unlawful warnings given to, Rodrigo Cuevas, Raul Alaniz, Roberto Barajas, Sergio Barajas, Carlos Bracamontes, Jose Chavez, Jesus Cortez, Jorge Garcia, Jorge Rocabino, Mario Torres Sandoval, Jose L. Tena, and Luis Vega; and to the unlawful discharge and unlawful suspensions of Efrain Ramos Tena and WE WILL**,** within 3 days thereafter notify each of them in writing that this has been done and that the discharges, suspensions, and/or warnings will not be used against them in any way.

WE WILL immediately provide the Union with the material it asked for on January 3 and February 27, 1997, as it is relevant to the Union's ability to act as your collective-bargaining representative.

WE WILL immediately rescind our practice of releasing paychecks at 4 p.m. on paydays and return to our previous practice of releasing them at 2:30 p.m., unless the Union has agreed to such a change.

JOHN KOLKKA, D/B/A KOLKKA TABLES AND FINNISH-AMERICAN SAUNAS, A SOLE PROPRIETORSHIP

Amanda Alvarado Ford and *Shelley Brenner* for the General Counsel.

Mark R. Thierman (with Donald G. Ousterhout on brief), of San Francisco, California, for the Respondent

Paul Supton Van Buurg (Weinberg, Roger & Rosenfeld), of Oakland, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case was tried in San Francisco, California, on 18 trial days beginning April 1, 1997, and ending July 1, 1997. It is based on a second amended consolidated complaint issued on March 17, 1997, by the Regional Director for Region 20 of the National Labor Relations Board. During the course of the hearing, another complaint was consolidated with it (Case 20–CA–27756–1). All of the charges were filed by Carpenters Union Local 2236, United Brotherhood of Carpenters and Joiners of America, AFL–CIO. The complaints allege that Respondent, John Kolkka, d/b/a Kolkka Tables and Finnish-American Saunas has committed a broad range of violations of Sections 8(a)(1), (3), and (5) of the National Labor Relations Act.[1]

Issues

For organizational purposes the allegations may be placed in four sequential patterns. In the first, beginning approximately

[1] The following paragraphs of the second amended consolidated complaint were withdrawn during the course of the hearing: 8(b), 21(b), 25(a), 25(f), 25(g), 25(h), 25(l), 25(m), and 25(n). By a footnote in its brief, the General Counsel has asked for permission to withdraw paragraphs 8(c), 12(d), 12(e), 12(I), 14(g), 14(i), 15(a), 18(a), 18(b), and 20(a). That request is granted.

May 10, 1996,[2] all of Respondent's welders and some painters engaged in a 2-day walkout to protest what they perceived to be unfair pay calculation procedures. The complaint asserts that Respondent's treatment of these individuals violated Section 8(a)(1). The second stage began when the employees sought representation by the Charging Party starting about May 15 and lasting through January 1997. The third, somewhat overlapping the second, is the allegedly unlawful discharge of four of the Barajas brothers, Francisco, Moises, Roberto, and Sergio on December 30. The complaint asserts that these individuals were discharged because of their union activities; Respondent contends that it had discovered that they did not possess correct social security numbers and were likely to be undocumented aliens, not entitled to employment in the United States. Furthermore, it asserts that these individuals were not discharged initially, but were given an opportunity to correct their paperwork but never did so. They were separated when they did not present corrected paperwork. The fourth concerns the treatment of Moises Estrada in April and May 1997, and was added during the hearing. For organizational purposes it belongs with stage two.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally and to file briefs. The General Counsel and Respondent have filed briefs which have been carefully considered. The Charging Party has adopted the brief of the General Counsel. Based upon the entire record of the case, as well as my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent admits that at all material times it has been the sole proprietorship of John Kolkka and is engaged in the manufacture of metal furniture and saunas at its plant in Redwood City, California. It further admits that during calendar year 1995, in the conduct of its business operations it sold and shipped goods valued in excess of $50,000 directly to customers located outside California. It therefore admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Respondent admits that the Charging Party is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent John Kolkka is the sole proprietor of this business. He, together with his wife, Stephanie Kolkka, has operated it for several years. Although the business does manufacture saunas, the portion of the business with which this case is principally concerned is furniture manufacturing. The furniture is made entirely of metal and the individuals fabricating the pieces must utilize metal bending and welding skills. After the furniture piece is built, it must be polished or "grinded" (sic) and then painted (finished). The actual fabrication of furniture occurs in Respondent's plant located on the corner of Kaynyne Street and Bay Street in Redwood City. The offices are in that building as well. The finishing or paint shop is located in a separate building some distance to the rear of the fabrication shop.

John Kolkka regards himself principally as a furniture designer and in recent years, has delegated plant operations to a manager. The current manager is John Butters, who was hired during the summer of 1995, approximately 8 months before the incidents involved here began. In addition there are several foremen (supervisors) of various departments and shifts. Hector Pedraza has been the day-shift welding supervisor since September 1995 and had been in charge of the grinders even before that. The night-shift welding supervisor was Fernando Flores; the paint shop supervisor was Jessie Souza.

The welding bays are located roughly in the center of the main plant. John Kolkka's office is located only a few feet away from that area. As the Company's principal designer, he often utilizes the welding machines to fabricate models, to work on prototypes or oversee a welder working on a piece which he has designed. At the opposite end of the building are the business offices. There are three or four managers/clericals located there, including Stephanie Kolkka, John's wife, and Alicia Williamson, Stephanie's sister. Although both are admitted to be supervisors and agents for Respondent, their duties are somewhat undefined. Stephanie Kolkka acts as an executive and Williamson seems to serve as John Kolkka's assistant.[3] Also in that location are the bookkeeper, Sherry Jones, who has a separate office, and some other office personnel.

Respondent employs about 45–50 individuals in its factory. During the days it has a full complement of welders, grinders, and finishers. In the evenings, it has a smaller number of welders, one or two grinders and no finishers. According to Butters, Respondent tries to operate primarily on a "production basis," meaning that each of the workers is to make parts and fabricate standard pieces of furniture, tables, and beds. It is not uncommon, however, to receive a "custom" order. Custom orders are usually deviations from a existing design, meaning the length or height needs to be adjusted, but not the general style. John Kolkka is usually involved with the special changes and may provide a handwritten design to the fabricator, together with the appropriate measurements. He also provides work on prototypes, if he chooses to assign that work to a welder instead of himself.

Respondent has traditionally paid its welders on a "piece-rate" basis, meaning that each standardized type of furniture which is fabricated has a specific "price" to be paid the workmen. Until 1997, the finishers were also paid on a piece-rate basis; they are now hourly. Grinders, however, have always been paid on a hourly basis. Furthermore, there were often times when the welders and finishers received payment on a hourly rate as well. One of the difficulties with the piece-rate was that the worker did not always know what the "price" was and Respondent was generally not very forthcoming in telling the individual what the price was either. Respondent utilizes a

[2] Unless otherwise indicated all dates are 1996.

[3] She was mistakenly described by the Union in its election petition as a "plant clerical."

three slip work order form to keep track of each item in production. Thus, when given an assignment, the employee would receive one copy of the slip and would fill it out to report his completion of the task, but would not always know what he was going to receive for that work. Employees came to believe, with some rationality, that from time to time Respondent changed the prices without informing them. I am not certain that the proof actually supports their conclusion, but clearly they had come to believe there was a problem in that regard. Some of that belief may have been engendered by the language barrier, some by Respondent's reticence on the subject for valid business reasons, some of it based upon employee suspicion. The language problem arises because many of Respondent's employees speak only Spanish while others are only partially fluent in English.

B. May 10-15; the Walkout and Response

According to the General Counsel's evidence, there were four individuals who raised concerns about the "price" on a frequent basis. These were Guillermo Cortez (Cortes in the complaint),[4] Rigoberto Moreno, Efrain Ramos Tena, and Jose Zepeda. Cortez and Zepeda were employees of the paint department while Rigoberto Moreno and Ramos Tena were welders. Without attempting to detail the evidence, I think it is fair to say that these four, as well as others, did indeed raise questions about the consistency of the prices being paid. Moreover, those questions had arisen fairly frequently since 1994. It was during a meeting in 1994 where Rigoberto Moreno first asked for a price list from John Kolkka. Subsequently, in 1995 Cortez also asked for a price list during meetings. Additionally, Zepeda and several other employees asked for such a list from S. Kolkka. In December 1995 Ramos Tena advised Butters (who had only been manager for a few months) that S. Kolkka had once told them that she would show them a price list but that she never had. In addition, Zepeda in January 1996 says the employees in the paint department noticed a reduction in paychecks and all of them asked Paint Department Supervisor Souza about the problem. Price problems were not resolved on the whole, although Respondent usually corrected what it regarded as errors. Respondent did allow two employees to read a handwritten price list as it stood in 1995, but they were unable to copy the entire list.

Of course, the question of whether or not Respondent actually paid the correct prices to these employees during this time is not before me. The only question is whether the employees were engaging in a form of concerted protected activity in pursuing that information on May 10 and 13. The complaint does not allege that any of these instances prior to those dates triggered an unlawful response.

On Friday, May 10, a payday, the night-shift welders became concerned that their paychecks were short. In a group they went to Night Supervisor Fernando Flores and demanded to speak to John Kolkka about the question. Manager Butters observed the group talking to Flores and momentarily inquired regarding what was going on. Because they were piece workers, he assumed that the only reason that their paychecks were smaller was because they had not produced as much as they usually did. He left and the matter remained with Flores. Flores acceded to the employees' request that he speak to John Kolkka on their behalf. One of the employees, Sergio Barajas, asked if they could sit in while Flores talked to Kolkka, but Kolkka insisted on speaking with Flores and Butters in his office. Through the office window, the employees could see Flores, Butters and Kolkka all conversing. The conference lasted approximately 2-1/2 hours.

In the meantime, the workers simply stood by their equipment and awaited the outcome of the meeting. They did not engage in any production that night. When Flores returned to them, he advised that he had a solution to their problem of not knowing the piece rates. He told them that in the future Respondent would write down the piece rate on the goldenrod copy of the work orders which they normally received after they had completed their particular piece of work, but which had not previously shown the price. This was a significant change from Respondent's practice in the past. Yet, the workers were not satisfied because they wanted to know the prices before they began work. Even so, this information for the first time allowed them to calculate on their own the gross pay which they were to receive in a pay period. Displeased, they told Flores that they wanted to leave work and go home. Flores observed that they hadn't really begun work that night anyway and it was pretty much a lost evening, so he granted permission for them to leave. He told them to return to work on Monday. The entire shift then left.

Over the weekend word of the encounter was transmitted by word of mouth from the night-shift employees to the day-shift employees. On Monday, May 13, the day-shift welders determined they would not work. They were joined that day by some, if not all, of the day-shift painters. There is also testimony that some of the night-shift welders appeared in a show of unity. Sergio Barajas, one of the night-shift welders, testified that over the weekend the workers had "agreed that all of us would go at 10 o'clock on Monday to speak with John Kolkka about the prices."

Before describing what occurred on Monday, May 13, it should be noted that the General Counsel's complaint asserts that as a result, Stephanie Kolkka told employees that they were fired; and that Respondent "terminated or suspended" the employees involved in that incident including (but not limited to) Cortez, Rigoberto Moreno, Efrain Ramos Tena, Zepeda, Rodrigo Cuevas, Jose Chavez, Jorge Garcia, Francisco Barajas, and others unknown to the General Counsel.

At approximately 8 a.m. that morning, the workers arrived as usual. Although some may have begun preparing their areas to perform work tasks, none of them actually went to work. The word had spread that the workers wanted to meet with John Kolkka and would not begin work until such a meeting had been arranged. Jose Zepeda testified that on the morning of May 13, a coworker named Jorge came to him and told him that it was time to leave; time to "go on strike."

Unknown to them, John Kolkka had not planned to come to the plant that morning. He had earlier told Butters that he would

[4] At the hearing Cortez spelled his name Cortes, although he had trouble spelling it. He said "Cortis." The payroll records show it to be "Cortez." I shall use that spelling here as it comports with company records.

not be in until Wednesday. When Butters arrived at approximately 8 a.m. on Monday, he observed the welders milling around and he tried to find out what was happening. At one point he went to the paint shop and by then a number of individuals had come from both plants, perhaps in part to purchase coffee and snacks from a snack truck which normally serviced the area. Although there is some variance regarding what occurred, again perhaps due to the language barrier, employees demanded that they be allowed to speak to John Kolkka. When he learned they wanted to speak to John Kolkka, Butters told them that he was the boss, that they could speak to him. He also told them that if they wanted to speak to Kolkka, they would have to come back on Wednesday morning, aware, of course, that Kolkka did not plan to return to the plant until then. His remark was later interpreted by some employees to mean that they could not come back until Wednesday.

In any event, Butters returned to the office and reported the occurrence by telephone to John Kolkka. About 10 a.m., John Kolkka did appear at the plant and the approximately 45 employees who were waiting followed him into an area adjacent to his office. He said that he would meet with one of them to discuss their problems but they insisted on speaking to him en masse. His conversation did not get very far before Stephanie Kolkka strode up to the group from her office area and, singling out Rigoberto Moreno, took him into John Kolkka's office. That office has a window which opens on to the plant floor. She, John Kolkka, Butters, and Moreno then had what appears to be a relatively heated exchange during which she accused Moreno of being the leader and demanding that he direct everyone to return to work. Rigoberto Moreno denied being the leader of the work stoppage.

The General Counsel asserts that Stephanie Kolkka physically assaulted Rigoberto Moreno during the discussion. While she was certainly animated during the confrontation, she never struck Moreno or injured him in any way. It would be an exaggeration to conclude that a physical assault occurred. I find that it did not.

Eventually Stephanie Kolkka came out of the office and began speaking to everyone in an angry fashion. Welder Efrain Ramos Tena surreptitiously recorded her words and the words of some of the individuals in response. A copy of the recording is in evidence as General Counsel's Exhibit .8. A corrected transcript is also in evidence as General Counsel's Exhbit 7(b). The tape itself is about 4 minutes long but S. Kolkka does not begin speaking until the second minute. At the end she is joined by John Kolkka, who made some remarks. Much of the recording is either unintelligible or unintelligible Spanish. The portions of the transcript spoken by Stephanie Kolkka and John Kolkka are set forth in the footnote, but do not reflect the pauses, the initial reasonableness of tone or the later angry tone demonstrated by Stephanie. Nor do they reflect the relatively calm tone used by John Kolkka in conclusion.[5]

It can be seen from the transcription, and heard via the tape, that at the end of the meeting, John Kolkka specifically asked for individuals to speak to him (or perhaps Stephanie) one at a time "or nothing." Efrain Ramos Tena, apparently speaking for the entire group, says "nothing" and at that point all of the people who did not wish to speak to the Kolkkas on an individual basis left. That was about 14 people. Approximately 30 other employees elected to stay and resumed work.

The individuals who left gathered in a nearby park for a short while, then visited a community group lawyer. They decided to do two things. First they decided to return to work on Wednesday, supposedly relying on John Butters' earlier direction that they return on Wednesday. They also decided to contact the Carpenters District Council to seek representation.

On Wednesday, May 15, all the employees who had chosen to leave on May 13 returned seeking to work. The General Counsel estimates that somewhere between 17 to 20 workers had actually left. Yet, the evidence shows 12 individuals received some sort of warning as a result of their refusal to work, and two were subsequently discharged. That suggests only 14 individuals were actually involved in the refusal to work.[6]

[5] Stephanie Kolkka:

Okay you have a choice. I will talk to you one at a time, I'm not gonna to talk to you like this, if you don't want to do that, you can go home and I'm closing down the shop. You understand? You understand? I know you understand George. . . . Okay, so, that is your choice. So, if you want to talk in your little mob scene, I'm gonna to close down the shop and I will do it. You want to talk to me one at a time, I will do it. I expect the rest of you to go back to work while I am talking to the other people. If you're not willing to do that, I will close down the shop. So, what do you want to do? (inaudible male voice, approximately 4–5 words). Because you speak English, that's why.

. . . .

[pause during which inaudible background discussion occurs]

Stephanie Kolkka: Would you please repeat this please? I will talk to everyone one at a time and I expect other people to go back to work [pause during which translation presumably occurs]. If they are not willing to do that, then I am closing down the shop [pause during which translation presumably occurs][followed by unintelligible voices speaking together, some Spanish, some English]. I will not be brow-beaten like this, and you're gonna lose your jobs, you're gonna lose your job over it, and I am not fucking around.

[Partially intelligible discussion occurs].

John Kolkka: Okay, one at a time, because everybody's gotta a little different situation here. You guys. Some of you guys have a problem with your paychecks. I know some you guys don't have a problem with your paychecks. The other guys are just hanging around for the party. Okay.

Stephanie Kolkka: It's no game and it is no party. And I will close down the shop and you will lose your jobs if you do not do what I tell you to do, and I am not fucking around here. So, it's up to you, one at a time, or nothing. And I expect the rest of you to go back to work while I am talking to the other people. And I want to talk to you first.

[Person believed to be Efrain Ramos Tena asks in Spanish if David [Palacios] can translate; a translation seems to begin but John Kolkka interrupts.]

John Kolkka: The guys that want to go, they go. The guys that stay, stay. . . . One at a time or nothing.

Efrain Ramos Tena: Nothing.

[6] The individuals who received warnings were: Rodrigo Cuevas (a night-shift employee for missing May 10, 13, and 14); Raul Alaniz (a day-shift worker for missing May 13 and 14); Roberto Barajas (a night-shift worker for missing May 10, 13, and 14); Sergio Barajas (a night-shift worker for missing May 10, 13, and 14); Carlos Bracamontes (a day-shift worker for missing May 13, and 14); Jose Chavez (a day-shift employee for missing May 13, and 14); Jesus Cortez (a night-shift

The General Counsel also asserts that Respondent has exhibited special animus toward the concerted activity because the night-shift workers were warned for the May 10 absence, even though Butters and Flores had given them permission to leave that evening. I am not certain that I can reach that conclusion because the fact is that although they were permitted to leave, they still performed no work that evening. It is probably better to analyze the matter in the overview by observing that both on May 10 for the night-shift employees alone and on May 13 for the day-shift employees and those night-shift employees who joined them, that they were all engaged in a concerted refusal to perform work. That is, they were engaging in a strike. *Liberty Cork*, 96 NLRB 372, 374 (1951). *Cub Branch Mining Co.*, 300 NLRB 97 (1990). Thus, to the extent that the activity was protected by the Act, the warnings that were levied upon them for unexcused absences were unlawful. Indeed, I find that those warnings were issued in violation of Section 8(a)(1) of the Act. *Robbins Engineering*, 311 NLRB 1079 (1993); *MCI Mining Corp.*, 283 NLRB 698, 704 (1987).

The General Counsel also asserts that these individuals were "suspended" between May 13 and 14 prior to their return. The General Counsel's basis for that conclusion is its assertion that the individuals had been threatened with loss of their jobs and had been told at the end of the meeting upon May 13 that they should leave. In fact, what they were finally told was that they could meet with John/Stephanie on an individual basis or "nothing." The job loss threat was not carried out during the strike. Indeed, based upon Efrain Ramos Tena's remark, they chose "nothing" and left. Clearly, an employer is entitled to insist that workers, who choose neither to work or talk about it, leave the premises. It is true that in her frustration Stephanie said some things which warrant scrutiny. She said that if individuals were not willing to return to work she was going to close down the shop, that she would not be brow-beaten and that individuals were "gonna" lose their jobs, punctuating that with a expletive.

Nonetheless, a reasonable interpretation of her words, as followed by the deeds, was that the individuals who would not return to work were to leave the premises. The Board has long held there is nothing unlawful about such a statement made to strikers. *Wilson & Co.*, 77 NLRB 959, 979 (1948), other parts of case revd. 173 F.2d 979 (5th Cir. 1949); *Electric Auto-Lite Co.*, 80 NLRB 1601, 1605–1606 (1948); *Crookston Times Printing Co.*, 125 NLRB 304, 316 (1959).

The General Counsel, however, interprets that remark as being either a discharge or suspension. Yet, Stephanie's reference to closing the shop, in context, simply meant that if everyone left that day she would be obligated to close the shop for the day, as no work could be performed.[7] Even so, all of that was overridden by John Kolkka's willingness to talk to the individuals, insisting that the conversations be one at a time. When the fourteen employees, led by Efrain Ramos Tena, said "nothing" and walked out, the employees who left the premises must be considered to have been on strike, rather than having been discharged or suspended. Therefore, the General Counsel's contention that these individuals were suspended and entitled to pay for the 2 days for which they were on strike is unsupported by the evidence. They were neither discharged nor suspended on May 13. Their decision to remain off work until Wednesday was voluntary. Whether they stayed out due to their interpretation of what Butters had said earlier or whether they simply chose to stay out for 2 days before returning is of no moment. Strikers are entitled to concertedly withhold work until they choose to return. The choice is theirs, not the employer's. No decision of the employer comes into play until the strikers offer to return. That occurred on May 15 and the individuals were treated as described above.

In fact two returning strikers were fired on May 15. These were Rigoberto Moreno and Guillermo Cortez. On that day Respondent also suspended Efrain Ramos Tena.

According to Butters, when he came to work on May 15, he discussed the situation with John and Stephanie Kolkka and learned that they had decided to discharge Rigoberto Moreno, Guillermo Cortez, and Efrain Ramos Tena. He testified that he did not have any problems with the discharge of Moreno or Cortez, but that he believed that the discharge of Tena was unwarranted and he argued in favor keeping Tena. As a result of his intervention, the Kolkkas reconsidered and decided to keep Tena. These three individuals will be discussed individually. In addition, Jose Zepeda's subsequent separation will be analyzed.

1. Guillermo Cortez

As noted previously during the morning of May 15 all of the individuals who had left on May 13 and who returned on May 15 were scheduled during the day for meetings with members of management. Cortez was called into the office about 10:30 a.m. where he spoke to Butters, Stephanie Kolkka and Hector Pedraza. Pedraza was the translator as Cortez is only marginally capable in English. Moreover, I have certain reservations about Cortez' credibility generally. At the time he testified he was incarcerated in a state penal institution having been convicted of a felony for the sale of illegal drugs. Beyond that, his demeanor on the witness stand suggested that he was not fully interested in telling the truth. He wished to ingratiate himself in some respects, and also wanted to shade and argue. His credibility on a related matter, dealing with Respondent's employment of undocumented aliens, is significant to the General Counsel's case in that area.

With respect to Cortez' discharge on May 15, Respondent does not really contest its illegality. Instead, it asserts that Cor-

employee for missing May 10, 13, and 14); Jorge Garcia (a day-shift employee for missing May 13 and 14); Jorge Rocabino (a day-shift employee for missing May 13 and 14); Mario Torres Sandoval (a night-shift employee for missing May 10, 13, and 14); Jose L. Tena (a night-shift employee for missing May 10, 13, and 14); Luis Vega (a night-shift employee for missing May 10, 13, and 14).

[7] Stephanie's remark made in heat ("you're gonna lose your jobs") was not so much a threat of discharge as it was an effort to persuade the employees to stay. Such a remark only rises to the level of a tactical threat, if anything. See *Woodlawn Hospital*, 233 NLRB 782, 788 (1977); *Matlock Truck Body & Trailer Corp.*, 217 NLRB 346 (1975). Moreover, her words were overridden by owner John Kolkka who told them to go to work and talk to him one on one or "nothing." The employees chose "nothing." Certainly no discharge was effected on May 13.

tez is not entitled to reinstatement because during the course of that discharge interview he threatened "to get" Stephanie Kolkka.

Although Cortez testified about the conversation in some detail, it is not necessary to describe it here as Stephanie Kolkka testified that Butters simply told Cortez, "On May 13, you abandoned your job, and we're choosing not take you back." Stephanie then testified that Cortez argued that he was a very good worker, although Butters disagreed, and when Cortez finally realized that the company's decision was final, he leaned forward into Stephanie's face, pointed his finger and said, "I'll remember this, Stephanie. I'm going to get you." The meeting ended at that point and Butters told Cortez that he could pick up his check later in the day.

Cortez denies making such a threat, but frankly based upon his demeanor, I am unable to credit him. Even so, the threat is vague and appears to have been made in the heat of the moment. If anything, it may have manifested itself later in a nonviolent way with reference to the undocumented alien issue. I do not find it sufficient to warrant changing the standard remedy relating to an incarcerated felon.

2. Rigoberto Moreno

As noted earlier, Rigoberto Moreno was the individual whom Stephanie Kolkka believed to be the leader behind the walkout of May 13, having singled him out earlier and taken him to John Kolkka's office. Rigoberto Moreno had been involved in earlier incidents regarding the price list issue. He is outspoken and sometimes abrasive, but is also a highly skilled welder who had fabricated some of the molds or "jigs" which Respondent used in its production procedures. Because he had fabricated them, he believed he had a possessive interest in them, although Respondent had paid him both for the work and for the devices. He nonetheless viewed them as his personal property.

On May 15, when he returned, he found himself discharged. He was unable to describe the discharge interview, not understanding the General Counsel's questions very well. He seemed more interested in the post-discharge issues relating to the demand for the jigs. Even so, there is little dispute over what he was told. Butters says he told Rigoberto Moreno that on May 13 he had refused to work, had walked out and had abandoned his job. "As far as we were concerned, he was no longer employed there, and we elected not to take him back."

As with Cortez, there is really no dispute about Rigoberto Moreno's discharge. Clearly he was being discharged because he had participated in the walkout. In addition, he had recently had been perceived by Stephanie as being the leader of the walkout. Again, Respondent does not really contest the allegation that the discharge was unlawful, but does assert that Moreno's behavior immediately following the discharge warrants a denial of reinstatement.

According to Butters, Moreno mumbled something about how he didn't want any problems for himself or his son,[8] and told Butters, "I want to take my stuff with me." Butters told him that he could take his personal materials, but company property had to be left behind. At that point, according to Butters, Rigoberto Moreno began demanding his molds. An argument ensued during which Moreno told Butters that if he couldn't take them he would destroy them. As a result of that exchange Butters asked Stephanie Kolkka to call the police. They arrived a short time later. In the meantime, Moreno cooled off, and began organizing himself for departing. After obtaining his personal items, he then collected the molds/jigs which he had stored in various places, including his tool box, his locker, and some along the ceiling. During the process, according to Butters, he slammed a few items on the floor. It does not appear that anything was actually damaged. In general, the jigs are made of heavy metal (although there are lighter ones) and the tools apparently withstood the maltreatment. My impression of it all is that Moreno was expressing his anger over the discharge, but did not actually exceed the bounds of civil behavior. Nonetheless, Rigoberto Moreno did testify that had he not been restrained, he would have destroyed the jigs with his blowtorch.

Since his departure from the company, he has declared himself to be totally disabled, having filed a claim to that effect shortly after his discharge. Accordingly, Respondent argues Moreno is not entitled to an offer of reinstatement because he is permanently disabled.[9] That issue will be dealt with in the remedial order.

3. Efrain Ramos Tena

As noted earlier, Butters had persuaded the Kolkkas not to discharge Efrain Ramos Tena. Ramos Tena did meet with Butters and Stephanie Kolkka in the afternoon of May 15 and was informed that he was being suspended until Friday, May 17. A memo to Ramos Tena's personnel jacket signed by Butters describes the circumstances:

> On Monday, 5/13/96, Efrain refused to work and left the work place and did not return until Wednesday 5/15/96.
>
> The insubordinate attitude Efrain displayed toward Stephanie Kolkka and the unexcused absence compelled us to administer a three day suspension, effective 5/15/96 and including 5/16 and 5/17/86.
>
> A copy of this memo will be kept in Efrain's personnel file.

As can be seen, the suspension is aimed at Ramos Tena's having engaged in the strike. It does reference a nondiscriminatory motive, the supposed "insubordinate attitude" displayed towards S. Kolkka. Nevertheless, there is no real evidence that he displayed any insubordinate attitude toward

[8] Rigoberto's son is Frederico Moreno, an occasional translator and an individual who later became a supervisor on September 13, 1996. It is apparent that sometime in the past, Rigoberto and Frederico had become estranged, the estrangement having occurred as early as 1994. Rigoberto's expressed concern for Frederico seems mildly misplaced in the circumstances.

[9] Respondent also contends that Rigoberto Moreno does not possess a valid social security number and is likely an undocumented alien not entitled to reinstatement. A comparison of Moreno's social security number as shown on his payroll ledger sheet with the valid range established by the Social Security Administration (R. Exh. 28) shows it to be presumptively valid. The number he uses begins with 559, within the valid range of 001 through 587. See further explication, infra. Accordingly, this defense is rejected.

Stephanie or anyone else either during the May 13 walkout or during the conversation of May 15. Accordingly, the only reason for the suspension was because he had engaged in a strike. I note that he was not discharged nor was he simply given a warning like the others; for some reason Respondent chose to follow some intermediate level of discipline, greater than a warning, but less than a discharge. This suspension violated Section 8(a)(1). *Robbins Engineering*, supra; *MCI Mining Corp.*, supra.

During the May 15 discussion with Butters and Stephanie Kolkka, they did advise him that some changes were being made in the manner in which he would perform his work. In the past, he says, his only real "supervisor" was John Kolkka himself and that his duties involved a great deal of "custom" work for him. Ramos Tena testified that Stephanie told him that he was no longer to take directions from John Kolkka, but to take them only from Pedraza. The General Counsel asserts this to be a significant change, but I do not find the facts to support that allegation. Pedraza had become the day-shift welding supervisor in September 1995 and had been Ramos Tena's supervisor since that time. In fact about a week before the May 13 walkout, Pedraza had signed an accident report on Ramos Tena's behalf when he injured his foot. In May Pedraza was not being newly assigned to supervise Ramos Tena as the General Counsel contends. He had been Ramos Tena's supervisor all along.

I am unable therefore to conclude that Stephanie's decision to assign him, after his suspension, to Pedraza was any kind of punishment. It was nothing more than to say that he was going to be asked to take all of his assignments directly from Pedraza rather than from John Kolkka. One of the concerns Butters had was that although Ramos Tena reported for work at about 8 o'clock or thereafter he often did not begin performing actual tasks until after speaking with John Kolkka. All Respondent was really doing was to give Ramos Tena his assignments somewhat earlier, thereby allowing him to begin working on his pieces sooner. In reality this allowed Ramos Tena the opportunity to earn more for himself as well as to increase his productivity insofar as the company was concerned. I cannot find that Stephanie did anything, aside from the suspension, during the May 15 meeting which constituted an unfair labor practice or which was fundamentally unfair. Even so, she was unhappy with him.

Ramos Tena testified without contradiction that she told him that if he did not want to work for Respondent, he could use the three day suspension to look for another job. He told her he did not wish to do so as he enjoyed working for Respondent.

Accordingly, I find only that the three day suspension constituted a violation of Section 8(a)(1).

4. Jose Zepeda

Jose Zepeda was a piece rate finisher who worked on the day shift. He had been involved, not as a leader, but as part of the group in some of the earlier efforts by employees to obtain the price list. In the May 13 incident, he was principally a follower, although he did speak to Butters shortly before John Kolkka arrived. Zepeda principally speaks Spanish. His English is very poor. He is apparently able to formulate short English sentences, but cannot conduct a conversation in English. He initiated a conversation with Butters saying they were waiting for John Kolkka and wanted to speak to him but Butters had no response for him. Later, when Kolkka did arrive, Zepeda says that when everyone gathered around him, in front of his office, Zepeda told him, "John, we want to speak with you." When Zepeda made the remark to John Kolkka, Kolkka looked around and waited for someone to speak. No one did so. According to Zepeda, Kolkka then began to walk away. It was at that point that Stephanie Kolkka arrived and the event previously described involving Rigoberto Moreno occurred. During the remainder of the May 13 incident, Zepeda remained one of the crowd. At the end, however, he joined those who left the building.

On May 15, Zepeda returned, but asked for a few days absence due to a medical problem he was having with his eye. He spoke to Jessie Souza, his supervisor, and asked for some additional days off to allow his eye to get better. Souza told him to take whatever days he needed.

On May 20, the following Monday, Zepeda returned. By then he had become aware that Rigoberto Moreno and Cortez had been fired.

There are two distinct versions regarding what occurred on May 20.

Zepeda says that he arrived at the plant at approximately 10 a.m. and went to Stephanie Kolkka's office window. He knocked and she turned around and saw him but did not let him in. She came out and he asked her in English, "Stephanie, may I return to my job?" According to him, she replied, "No more job for you." As a result, Zepeda left. He says he believes he had been discharged.

Stephanie Kolkka testified that on May 20, she was in her office and sometime between 11 a.m. and noon, Zepeda came to her sliding glass window. She opened it and the following occurred:

> Q. (by Mr. Thierman): And then what happened next?
>
> A. (Stephanie Kolkka): The first thing he said to me was "I quit."
>
> Q. Did he say it in English or Spanish?
>
> A. In English.
>
> Q. What did you say, if anything?
>
> A. I said, "What? You quit?"
>
> Q. And what'd he say?
>
> A. He said, "I quit."
>
> Q. And then what happened next?
>
> A. I walked out into the hall, and I said, "Do you know what you are doing?" . . . and he said—"I want my check."
>
> Q. And what'd you say?
>
> A. I said, "Well, you'll have to"—that was a Monday, I said, "Payroll's Friday. You'll have to get your check on Friday."
>
> Q. And what else happened? Anything?
>
> A. I said "You need to go to your supervisor."
>
> Q. And who is his supervisor?
>
> A. Jessie Souza.
>
> Q. What happened after that, did he leave or—

A. He left, and he said, "Okay." He left, and I went back into the office.

Later that day, she says Souza submitted a handwritten interoffice memo (GC Exh. 6) which was directed to bookkeeper Sherry Jones. In the memo Souza said, "Please be advised that Jose Zepeda has tendered his resignation as of today's date. Please arrange for his final paycheck including any accrued vacation pay." The memo's date box shows the date "05/20/96." The subject line says in what appears to be Souza's handwriting, "Jose Zepeda." Underneath that line, also in Souza's handwriting, was the word "Resignation" followed by Zepeda's signature.

Zepeda testified that on May 24, when he returned for his paycheck he spoke to Souza, who gave him the check, but then asked him to sign a blank piece of paper. Zepeda did so asking why he should. Souza explained that Zepeda was simply acknowledging receipt of the paycheck.

The paper which Zepeda actually signed (GC Exh. 6), is really not a blank piece of paper, but is a commonly used memo form called "rapid memo" with boxes and lines.

Nonetheless, Zepeda denies that he ever told Souza or Stephanie Kolkka that he was quitting. He also denies that he knows what the English word "resignation" means. The parties stipulated that Zepeda never described the circumstances of signing the blank paper in the affidavit which he gave the Board investigators.

Based on Zepeda's testimony, the General Counsel asserts that Zepeda was fired by Stephanie Kolkka on May 20 and was later tricked by Souza into signing a resignation letter. The General Counsel points to Rigoberto Moreno's similar testimony, that Sherry Jones asked him to sign a blank piece of paper when he was given his check. Respondent argues that Moreno, while in the hearing room, had heard Zepeda's testimony to that effect and had fabricated his own to support Zepeda. Like Zepeda, Rigoberto Moreno did not include such a description in the affidavit which he presented to the Board investigator.

Frankly, I have serious doubts about the testimony of both Zepeda and Rigoberto Moreno regarding the presentation of blank papers to sign. If employees are being paid by check, no written acknowledgment or receipt is necessary. Their endorsement is perfectly adequate and Respondent would know that. The procedure seems to me to be entirely unlikely.

More to the point is the fact that Zepeda appeared between 10 a.m. and noon on May 24, some 2 to 4 hours after his regular starting time. Had he wished to go to work, he would have reported at his usual 8 a.m. start time and gone directly to Souza. The mere fact that he was aware of the discharges of Moreno and Cortez would not deter him from reporting to his normal work location. Moreover, if Respondent had wished to fire him, it would have taken advantage of the sick leave which he had taken between May 15 and May 20 to arrange for that. Checks would have been prepared and would have been given to him at the time he arrived to return to work. No such checks were ready and it seems entirely unlikely that Stephanie Kolkka discharged him on May 20.[10]

Accordingly, I find that the General Counsel has failed to prove that Respondent discharged Zepeda on 20; the proof instead demonstrates that Zepeda voluntarily quit on that day for reasons of his own. Zepeda's testimony regarding the entire matter is not consistent with his affidavit or general probability. I do not find it to be credible. This allegation will be dismissed.

C. The Union Organizes Respondent

1. An overview

During the employees' May 13 and 14 strike, they decided to seek union representation. They eventually contacted the Charging Party, and organizers Jay Bradshaw and Luis Solares were assigned to organize Respondent.

As will be seen, during the election period and thereafter Respondent did indeed commit numerous violations of the Act. Despite Respondent's conduct, the Union had no difficulty in obtaining sufficient authorization cards to support an election petition. Indeed, the petition in Case 20–RC–17168 was filed on May 29 only 14 days after the walkout ended. The Stipulated Election Agreement was approved by the Regional Director on June 18 and the representation election was conduct on August 9. There were some challenged ballots which were determinative of the outcome of the election and the Employer filed some objections to conduct affecting the outcome of the election. On September 19 the Regional Director issued a report and recommendation on those matters and the Board, on December 16, overruled the challenges and directed that some of the ballots be counted. The revised tally of ballots was issued on December 31. That tally showed that 25 votes had been cast for the Union, while 18 were cast against representation. As a result of that tally, on January 8, 1997, a Certification of Representative was issued in favor of Carpenters Local 2236 and the District Council.

It is against that background that most of the remaining allegations are seen. One matter which transcends the first two stages is the alleged constructive discharge of Efrain Ramos Tena. Another matter which passes through and becomes the third stage, is the separation from employment of the Barajas brothers on December 30. Ramos Tena and all the Barajas brothers were, to some extent, involved in circumstances relating to the union organizing. Other employees were equally involved.

2. Social security and IRCA intrude

On May 23, only 10 days after the concerted activity walkout and 6 days before the union filed its petition for an election, the Social Security Administration, Office of Central Records Operation, in Baltimore, sent Respondent a form letter. It advised that more than 10 percent of the forms W-2 which Respondent had filed with the Internal Revenue Service for employees for the tax year 1995 showed names or social security numbers which did not agree with SSA records. Among other things,

[10] California law requires an employer to pay a discharged employee for all his time on the day of the discharge. Respondent had followed that law on May 15 with Cortez and Moreno and was well aware of the requirement.

that office advised that under the Internal Revenue Service Code, the IRS could charge a $50 penalty each time Respondent did not furnish a correct social security number and could also levy a similar fine against the employee for failing to furnish a correct SSN.

In addition, the SSA letter stated: "Before you file your next annual wage report, please make sure your employment records and the Form W-2 you report have your employees' correct names and SSNs." It set forth some "tips" to follow to ensure that the SSNs were correct. First, it suggested that the employer ask its employees to check their forms W-2 against their social security cards and make any corrections which were necessary. It further stated if the card was incorrect, to advise the employee to request a corrected card from the nearest Social Security office. The letter noted that a way to determine whether an SSN was correct was to check the first three digits to determine whether they fit the combinations which the SSA had listed in the letter. It went on to say that any SSN containing numbers other than those listed were not valid.

Another tip was to ask to see each employee's social security card and record both the name and number exactly as shown on the card. Seeing the card, according to the SSA, would help to ensure that all the records were correct.

Although the letter contained some additional material, it concluded by setting forth a toll-free number which the employer could call to answer other questions.

Upon receiving that letter, Respondent, particularly bookkeeper Sherry Jones, realized that not only were IRS problems being raised by the invalid social security numbers, there were other equally serious problems. Since SSNs are often utilized as one of the "identifiers" on the I-9 forms required under the Immigration Reform and Control Act of 1986 (IRCA), false SSNs could lead to sanctions under that statute as well. Those sanctions are both civil and criminal.

Jones then tracked the social security numbers of at least some of the employees. She determined that nine employees did not have SSNs that fell within the range described by the SSA. Based upon that information, Respondent, beginning on May 29, and lasting through June 7,[11] delivered letters to each of the nine employees. An example is a letter delivered to Vincente Medina on May 29. The letter advised that pursuant to information provided by the Social Security Administration that his SSN was invalid. It further stated: "In order for you to continue your employment with this firm you must contact the local social security office and obtain a written verification of your valid social security number." Pending resolution of that problem, the employee was not permitted to work. After a short absence, eight of the nine employees returned. Seven of those, Julio Flores, Robert Hurtado, Moises Barajas, Jose A. Tena, Jose L. Tena, Juan Tena, and Miguel Tena, all came back within a few days. Medina returned on July 22, some 6 weeks later than the others. One, Mario Mendez never returned. All of those who returned presented SSNs which fell within the 3-digit range prescribed by the Social Security Administration.

[11] Respondent stipulated that on June 7, it hand delivered copies of the letter to the rest of the individuals who had not already received one.

Butters testified that their quick return did cause some suspicion. Although the letters to the employees had said that they needed to have written confirmation from the Social Security Administration, that requirement was not enforced. Once the first three digits of the new card fell within the range of numbers which were acceptable, Respondent allowed them to return to work.

The General Counsel argues that because of a font variance that appears on the face of the newly presented social security cards (see GC Exhs. 129 through 133, and R. Exh. 25), Respondent knew or should have known that they were false, particularly when presented as quickly as they were. Furthermore, the General Counsel points to the testimony of Guillermo Cortez to the effect that in 1990 or 1991, he observed Stephanie Kolkka tell two employees to get some money from the bookkeeper to allow them to purchase false documents. Together, the General Counsel argues, that evidence supports the conclusion that Respondent knows that many of its employees are illegal aliens, not entitled to work in the United States and that it was taking advantage of their illegal status and using the social security card problem as a excuse to discharge individuals who were believed to have been engaged in union activity. In particular, that argument comes to the fore infra, in dealing with the Barajas brothers' separation in December.

However, as noted in a previous section, I simply do not believe Cortez. He is not a reliable witness, not only because of his felony conviction, but because of his general demeanor and presentation. Furthermore, there is a substantial likelihood that Respondent believed these individuals had worked their problems out with the Social Security Administration and simply chose, as it was obligated by IRCA to do, not to look beyond the face of the documents,[12] their suspicion notwithstanding. Moreover, there is no evidence that Respondent did compare the cards' fonts or that it would have meant anything if it had. The photocopies of the cards are no doubt separately kept in the respective personnel files of each employee.

Furthermore, as Butters testified, Respondent had become sensitive to the social security number issue in an unfair labor practice context. Once it wrote the letters to the employees in May and June, the letters drew unfair labor practice charges from the Charging Party, Cases 20–CA–27302–1, filed on June 12 and 20–CA–27302–3, filed on July 1. Eventually both of those charges were dismissed by the Regional Director, but they gave Respondent pause. From its perspective it did not know how to proceed. On the one hand, the Social Security Administration had directed it to correct a greater than 10-percent error problem with its social security numbers, by giving directions to its employees to make corrections. Without the corrections IRCA barred them from working. On the other hand, when it tried to follow the IRCA mandate,[13] unfair labor

[12] See discussion at sec. IIID and fn. 32, infra.

[13] I shall not attempt here to describe in detail the various activities which are barred by the Immigration and Naturalization Act and its amendments, including IRCA, but observe that 8 U.S.C. § 1324(a) describes the criminal penalties for bringing in and harboring certain aliens or for utilizing those aliens for purposes of commercial advantage. Depending on the fact pattern, an individual such as Respondent might find itself criminally liable for felonies for which the penalty

practice charges were filed asserting that such conduct violated the National Labor Relations Act.

The General Counsel does not give much weight to this particular dilemma, but in fact it is quite real. That is so even though the Regional Director had dismissed the two charges in question. Respondent, advised by counsel, undoubtedly didn't know which risk to take. In fact, if one looks at the financial liabilities, discharging an individual in the face of a Section 8(a)(3) would create for larger financial liability than the $50 fine from the Internal Revenue Service. However, the fines levied by the INS under IRCA can be substantial and if the INS asserts that an employer is engaging in a pattern and practice of hiring illegal aliens, that could create substantial criminal liability. Respondent assessed its principal risk as being from the Board, and decided to halt the social security number review, although it had not yet fully inquired about the validity of all its staff members' social security numbers. After all, its most immediate problem was dealing with the upcoming NLRB election.

3. Early organizing and some 8(a)(1) conduct

I now turn to a series of allegations involving Section 8(a)(1) which occurred in connection with the Union's organizing efforts as well some which occurred after the election, but during the processing of the objections and challenges. Some of these 8(a)(1) allegations involve suspensions.

Actual union organizing began on May 25 when organizer Bradshaw conducted a meeting at the Redwood City Community Center. There were about 35 employees in attendance and most signed union authorization cards. They formed an organizing committee consisting of about seven or eight individuals, later expanding that number to nearly anybody who wanted to belong. As a result of that meeting, on the following Tuesday, May 27, at the 4:30 p.m. shift change, Bradshaw appeared at the plant together with the committee and spoke to John Kolkka.[14] He told Kolkka that the workers had joined the Union and he wanted to talk about negotiating a contract. Kolkka ordered him off the property and said if the workers didn't get back to work, they were going to be fired. Bradshaw protested that the individuals were engaging in activity protected by the National Labor Relations Act and that discharges might result in Kolkka being liable. He then left a recognition form with him, but Kolkka wouldn't take it. Bradshaw says Kolkka became very agitated and "got right in my face." At that point the night-shift workers put on their "Union Yes" buttons and started their shift, while Bradshaw and the day-shift workers met outside and held a short rally.

Two days later, the election petition was filed. Also on that day, the Union sent a letter to Kolkka asking for voluntary recognition.

Subsequently, on June 4, Bradshaw and the committee again met outside the plant during the afternoon shift change. Prior to the second meeting Bradshaw had generated a petition with the signatures of some 35 employees on it. It was in Spanish and simply stated their reaffirmation of their support for the Union. It also asked that Respondent reemploy workers who had been discharged based on their participation in union activities. The only individuals affected at that point were two of the persons whose social security cards had been found to be irregular.

Bradshaw decided not to go into the plant and instead asked Roberto Barajas to try to deliver the petition to Kolkka. Roberto Barajas did not testify although Bradshaw says he received a report from Efrain Ramos Tena that it had been refused. Subsequently, it was faxed to the company. In the meantime, Bradshaw led a rally of about 20 day-shift employees in front of the office.

A week later on June 14, Bradshaw conducted another rally shortly before 4 p.m., consisting of both day and night-shift Kolkka workers as well as 60 unrelated union members. There is some evidence that John Kolkka and some other managers, including Butters and Alicia Williamson, observed that rally.

Similarly, another rally was conducted on June 21 led by eight organizers and supported by 25 to 30 Kolkka workers. Another meeting was conducted on July 15. It was during that period of time that Williamson prepared, distributed and posted a flyer with a photocopied photograph of Bradshaw and his bullhorn. The message on the remainder of the flyer refers to that individual as a "Unionius goonis," an endangered species. If the flyer was an attempt at satire, it failed; it was only one step away from vitriol. Yet, the flyer qualifies as speech protected by Section 8(c). It may have played a role in November, together with another document, when Bradshaw was given a citation based upon a citizen's arrest generated by Williamson.

In addition to demonstrations in front of the plant, held weekly and sometimes twice a week, the Union also engaged in informational picket lines (perhaps best described as product boycott picketing) at the stores of Respondent's customers through May 6, 1997.

On at least two occasions, prior to the August 9 election, Respondent conducted a series of small meetings with plant employees. These were generally efforts to persuade the employees to vote against union representation. Although Respondent is able to characterize at least some of this as permissible free speech, it does not really contest many of the 8(a)(1) allega-

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ranges from 5 to 1 years in prison. Furthermore, an employer who knowingly hires at least 10 individuals while having actual knowledge that those individuals are illegal aliens is subject to a 5-year imprisonment term as well. In addition, in both circumstances, significant criminal fines may also be imposed under Title 18 of United States Code. IRCA itself provides for both criminal and civil penalties. See 8 CFR § 274(a)(10). In the case of a pattern or practice of violation of that act, an employer can be fined up to $3000 for the hire of each unauthorized alien as well as a 6-month prison term for engaging in the pattern or practice. And, an employer found to have knowingly hired an illegal alien can also be subject to civil penalties ranging from $250 to $2000 for the first offense, $2000 to $5000 for a second offense, or from $3000 to $10,000 for additional offenses. Finally, assuming that the appropriate employment verification requirements had not been met when the illegal aliens were hired, an employer would be subject civil penalty ranging from $100 to $1000 for each of those violations.

[14] The General Counsel asserts that Francisco Barajas and Sergio Barajas were standing with Bradshaw during the May 27 discussion and must have been perceived as being the forefront of the organizing effort. Assuming that they were standing there, it does not follow that they were perceived as being any more active than the rest of the 15 or 18 individuals who were present at the time.

tions.[15] There are problems of translation which Respondent cannot effectively address and there may have been some overreach with which it will not quarrel. For that reason, I will simply describe them by type. They run the gamut of familiar preelection restraint and coercion. They include threats to close the facility if the Union won, threats to move the facility to another state if the Union won, statements that there would be no future for employees if they voted for a union, threats to institute stricter rules if the employees voted for the Union, solicitation of grievances from employees and promises to remedy them if the Union was not selected, interrogating employees about their union sympathies and the sympathies of coworkers, threats of job loss if they supported the Union, threats to reduce the piecework pay rate if they selected the Union, threats of losing vacation requests if the Union won and threats of "unspecified reprisals" because of their union activities.

All of these are violations of Section 8(a)(1) and need not be detailed.[16] Despite these systemic interrogations, threats, and general coercive conduct, the Union obtained a majority in the August 9 election, although the certification was delayed due to the objections and the challenged ballots.

There is however one witness upon whom I do not rely at all. He is Ariel De La Quintana. I have rarely experienced as an administrative law judge a more intransigent witness. He was called by the General Counsel to support some 8(a)(1) allegations, but he demonstrated an uncooperative, truculent attitude toward the Government attorneys. I granted their motion to treat him as a hostile witness because he was even hostile in a nonlegal sense. He repudiated his affidavit, asserting that he was intoxicated when he signed it and had not read it. The General Counsel urges that I accept his affidavit as true and make findings pursuant to that sworn statement. Although the rules entitle me to do that, I must decline. I am principally concerned with Respondent's inability to cross-examine such a witness. He was not only hostile to the General Counsel, he was hostile to the entire judicial process. Even assuming that he was cooperative and attempting to tell the truth at the time he wrote the affidavit, Respondent might well have been able to effectively cross-examine him, had he been examinable in any way. Certainly there is no evidence that Respondent procured his attitude and that the affidavit should therefore be used against it as some sort of sanction. Allowing this evidence would simply permit the witness' hearsay evidence to stand unchallengeable. That, I can not bring myself to allow. Moreover, his affidavit smells of exaggeration.[17]

I now turn to issues raised by Respondent's postelection concern with union stickers. The stickers we are concerned with are mostly small "Carpenters Local 2236" stickers but there are some that say "Union Yes" in Spanish and there are also some bumper stickers. Their size is not an issue here, nor is the message. The stickers had appeared prior to the election and were worn on individuals' clothing and also applied to a variety of items ranging from welding masks to tools, toolboxes, lockers, and other locations. There is no contention that Respondent barred individuals from placing stickers on their

[15] Respondent's counsel, Thierman, in his opening statement of May 28, 1997, basically conceded that it was not worth Respondent's while to attempt to refute 8(a)(1) statements. He said:

> The other thing is I maintained throughout this trial, and I am going to continue with that philosophy, is that there are miscellaneous 8(1) [sic] statements all over the place. Some may have happened. Some may have been mistranslated. Some may not have happened. Penalties as the Board or Judge knows, is post[ing] the notice. And the effort and energy expended when there is animus in the air or statements that are floating around or whatever are also going to be something I am going to consider as a cost benefit analysis. And when you have one-on-ones on noncritical issues and people talking to each other in hushed voices, sometime it's best to say, "fine" post a notice, and get on with life.
>
> And so with all candor, I'll tell you right now that I'm going to try to keep this as short and sweet as possible. . . .

[16] The following is a list of the 8(a)(1) allegations for which there is factual support in the testimony of the listed witnesses. All were committed by John or Stephanie Kolkka unless a different supervisor's name is shown in the parentheses:

> Threat to close or move the business if the Union won the election: Francisco Barajas, Sergio Barajas, Jose Chavez, Rodrigo Cuevas, Moises Estrada and Mario Torres.
>
> Threat to refuse to negotiate a contract with the Union, rendering union organizing a futility: Sergio Barajas.
>
> Interrogation of employees regarding their union sympathies or how they intend to vote: Moises Barajas, Octavio Barajas, Jose Chavez.
>
> Offer of a bribe to an employee in the form of promotion/wage increase to induce an employee to switch from pro-union campaigning to pro-employer campaigning: Efrain Ramos Tena.
>
> Threats of unspecified reprisal if the Union won the election: Moises Estrada, Moises Barajas.
>
> Solicitation of grievances with an offer to fix them in order to undermine the need for union representation: Rodrigo Cuevas, Mario Torres.
>
> Threats that employees would lose existing benefits or suffer reduced wages if the Union won the election: Moises Barajas (Pedraza); Francisco Barajas (Souza), Cuevas (Flores).

[17] Page 2 of De La Quintana's translated affidavit reads as follows:

> There is no doubt that company knows that I am in favor of the Union. Hector [Pedraza] saw my button and union hat and he spoke to me frequently about the union. I remember that every week, three or four times a week, Hector would speak to me about the union. He told me if the union came in there would be no breaks at work, we are going to loose [sic] workdays, and the employees would loose [sic] the opportunity to leave work to attend court, or if their father or mother died. He told me this *every week* during the months of June and August 1996 before the election. After the election he spoke to me about the union *two times each week*. He also told me that the union are thieves and it is no good. . . . (Emphasis added.)

The frequency with which he describes Pedraza's statements seem most unlikely, unless Pedraza suffers some sort of antiunion obsession. Frankly, in viewing Pedraza that seems unlikely. Moreover, De La Quintana is only partly corroborated by Moises Barajas.

One question that might be asked of this witness is whether or not he gave false testimony in his affidavit and went to great lengths to not have to repeat the falsehoods during his live testimony. Whatever the facts may be regarding why he did what he did, the account in his affidavit must be rejected and it should not be used in a substantive manner. Accordingly, to the extent that the affidavit refers to lost work, lost leave opportunities, and interrogations, poor future prospects or how he intended to vote, it is unreliable. His entire participation in this proceeding is without value.

persons, or wearing buttons or even apparel with a union, related message. Generally speaking, the facts as related below deal with Manager Butters' postelection directives to remove the stickers from what he believed was company property. The employees involved would not cooperate, sometimes on the ground that it was their personal property, asserting Butters had no right to issue such a directive. In at least one instance, a toolbox, the ownership is disputed. From a company perspective, the issue was not one of stickers, as much as it was one of insubordination demonstrated by a hostile refusal to follow the directive.

Before discussing the facts, it is appropriate to be aware of the Board's law on the posting of stickers. In *Malta Construction Co.*, 276 NLRB 2494 (1985), the Board observed that the Supreme Court in *Republic Aviation Corp.*, 324 U.S. 793 (1945), approved the Board's holding that employees had the right to wear union insignia and stated, "The right of employees to wear union insignia at work has long been recognized as reasonable and legitimate form of union activity. . . ." 324 U.S. at 802 fn. 7. *Malta* then observed that in *Kendall Co.*, 267 NLRB 963 at 965 (1983), the Board had said, "[A] rule that curtails that employee right [to wear union insignia] is presumably invalid unless special circumstances exist which make the rule necessary to maintain production or discipline, or to ensure safety." It then went on to hold in *Malta* that the employer's rule prohibiting the placement of union stickers on distinctive colored hard hats interfered with the right to wear union insignia on personal apparel, even though the hard hats had been supplied by the company and were not the property of the employee.

Then, in *Minette Mills, Inc.*, 305 NLRB 1032 (1991), enfd. 983 F.2d 1056 (4th Cir. 1993), the Board affirmed the administrative law judge's dismissal of an allegation relating to the posting of stickers on the wall of the facility. There the evidence showed that employees had plastered approximately 150 stickers on the walls, windows, bathrooms, and bulletin boards in the plant. These stickers were difficult to remove. They were in such great quantity and so difficult to peel off that they constituted defacement of company property. The administrative law judge held that the threat of discharge over that conduct was lawful because the company had a reasonable belief that its employees were engaging in misconduct.

That can be contrasted with *Orbit Lightspeed Courier Systems*, 323 NLRB 380 (1997), which held that it was a violation of Section 8(a)(1) of the Act for an employer to remove union stickers from a lamppost on a public street outside the office. However, no violation was found in *Orbit* when the employer removed union stickers from bathroom walls and furniture in the company's offices. More recently, in *Eastern Omni Constructors,* 324 NLRB 652 (1997), the Board adopted the decision of an administrative law judge who rejected an employer's contention that so long as it permitted employees to wear union buttons or stickers on their clothing, it could prohibit them from wearing such items on a company supplied hard hat. The upshot of all this is that clearly the Board continues to draw a distinction between employees wearing union messages on their person and employees utilizing company property as a semipermanent advertising sign.

Connected to that issue is the question of whether an employer violates Section 8(a)(1) by some sort of disparate enforcement. To some extent, the facts here suggest that Respondent allowed other "stickers" to be posted on company walls tools or machines which were not removed. Supposedly these include a sticker from a radio station and a poster for a Mexican movie. At the outset, it should be observed that the evidence regarding these two matters is quite vague. There is no showing where the radio station sticker was posted, whether on an individual's personal property or on a company owned item or wall. Nor is there any testimony regarding how visible it really was. Insofar as the movie poster is concerned, it seems that the greater likelihood is that it has nothing to do with advertising, but probably serves as some sort of decoration. One of the employees also testified somewhat vaguely that he had put a radio station sticker and a beer promotion sticker on a locker and there were "some others" on a machine as well as something posted on some wood. His testimony is a little ambiguous because it is unclear whether he was referring to the union stickers or to other stickers.

The complaint attacks both Butters' instructions to remove the union stickers from employees' personal belongings as well as the punishment which allegedly followed.[18]

An amalgamation of the testimony of various individuals leads to the conclusion that Butter's directives all occurred on Friday, August 23. They were given to three employees, although one of them, Jorge Garcia, was not on duty at the time.

Jorge Garcia is an alien who has been authorized to work in the United States. His permit must be renewed periodically. It is undisputed that the permit expired on August 19 and that he had been given, over the preceding weeks, several admonitions to get it renewed, but he had not presented a renewal. He reported for work on August 20. Shortly before 10 a.m., Butters directed him to cease working until he obtained a renewal. Garcia returned on the morning of Friday, August 23. According to Butters, he still did not have the permit and Butters told him that there would be no work for him until he got it. Garcia checked out at approximately 10 a.m. He appears to have been slow to leave and got caught up in what followed.

Also that morning, Butters observed Efrain Ramos Tena's work area and noticed that there were four union stickers on Tena's toolbox. Tena admitted that he had approximately 20 or 30 such stickers in his possession. Butters, in the belief that

[18] Butters testified that the company really had no policy regarding stickers until June. His testimony:

> At that time, the Union campaign was moving along towards the election. Some of the anti-union people were putting up notices on the bulletin boards and the union people said that they didn't like having those up. I said no one gets to use the bulletin board, no one gets to put anything on the walls, no one gets to have anything. I took down everything that had to do with anything including bullfighting posters, letters, anything that the employees put up. . . . I had no policy about stickers on clothing.

According to him, the only policy dealt with stickers on company equipment. He says that he advised his supervisors of the policy but did not announce it generally. He is under the impression that his supervisors told the employees themselves. The employees, however, deny ever hearing of such a policy.

the toolbox was company property, directed Tena to remove them. Tena refused asserting that the toolbox was his personal property. (He says it was a wooden toolbox which he had made from scrap material provided by the Company.) Butters directed him on at least four occasions to remove them, corroborated by the nearby Garcia, but Tena hotly refused to do so.

Butters, deeming Ramos Tena's response to be excessively hostile, told Tena to go home, that he was suspended. Ramos Tena refused to leave and Butters called the police. Tena was later escorted from the facility by the police department.

According to Garcia, Roberto Barajas had observed the confrontation and he chose to protest it. (As noted earlier, Roberto Barajas was not called as a witness and we therefore do not have his version even though he was the direct participant.) Garcia asserts that Roberto Barajas made a cardboard sign which said, "No discrimination" and hung it around his neck. A short time thereafter, Butters observed the sign and, according to Garcia, got into an agitated discussion about whether or not Respondent discriminated against anybody. Butters asked Roberto Barajas to remove the sign and according to Garcia, Roberto refused. This, too, resulted in a direct refusal and Butters directed Roberto to leave. He refused and would not go until after Butters called the police and they escorted him out.

Butters denies that he ever suspended Roberto Barajas on August 23. He does say that he sent Roberto home that day, when Roberto came and told him that he could not do the jobs which had been assigned to him. He says Roberto told him the company was out of stock on some parts for one of the projects and he did not know how to do the other one. Hearing that, Butters told Roberto that he had no more work for him to do and that he should leave. Roberto refused. Butters did not wish him to be standing around doing nothing, so he again asked Roberto to leave the plant. Roberto continued to refuse. As a result, Butters, well aware of his need to call the police to remove Efrain Ramos Tena a few minutes before, decided to call them back to remove Roberto Barajas. They did so.

A few minutes after Roberto Barajas was escorted out of the plant, according to Garcia, Butters came to his work place and observed that he had stickers on his bag and on other personal possessions. On Butters' request to remove those, he decided to refuse as well. When Butters threatened to call the police to remove him, Garcia agreed to go without the necessity of calling the police. He says he wanted to "preserve his dignity."

Butters denies the incident in its entirety with respect to Garcia. He says that Garcia was not supposed to have been at work that day anyway since he still did not have his work permit renewed and he could not allow Garcia to work.

Garcia on the other hand flatly denies that he was off work in mid-August for 3 or 4 days to renew his work permit. He claims that he had already obtained an extension and therefore was eligible to work beginning on August 20.

Butters, however, had placed a memo in Garcia's personnel file dated August 20 explaining his status. The memo notes that Garcia had presented a letter from the INS indicating that they had received an application for permanent resident status and that Garcia was contending that it constituted a work permit. Butters noted that he had told Garcia that he had to either bring in a new work permit or a letter from the INS stating that he was eligible to work.

Frankly, of the two versions, I find Butters' the more logical and more credible. Accordingly, his version is credited and I find that Garcia was never suspended for anything involving stickers.

In crediting Butters' version here, I also note that Garcia is the only person to have testified regarding the treatment of Roberto Barajas, except for Butters. Why didn't Barajas testify? Since I cannot credit Garcia on the one matter, I see no reason to credit him on the other. Accordingly, I find that Butters' version with respect to why he sent Barajas home to be the more credible of the two.

In that regard, I note that even if Roberto Barajas had been sent home, he came back a later that morning, apparently with the assistance of Solares and/or Bradshaw. He spoke at that time directly to John Kolkka and Kolkka put him back to work that afternoon. He was only off work that morning from 10 a.m. to 1 p.m. Garcia, of course, came back to work the following Monday, having presented appropriate evidence that his work permit had been renewed. Had he simply forgotten to bring it in earlier? That certainly seems likely.

Resolution of these two alleged suspensions, however, does not resolve the issue of whether or not Butters improperly told Efrain Ramos Tena that he had to remove the stickers from his toolbox. It appears to me that Butters made a mistake here. I accept Efrain Ramos Tena's version that John Kolkka had given him the scrap wood from which he had fabricated the toolbox. Accordingly, he had every reason to believe that it was his personal toolbox and it seems likely that it was. As the toolbox was a personal item, Butters did not have the right to insist that the stickers be removed from it. Accordingly, I find that Respondent violated Section 8(a)(1) when it directed Ramos Tena to remove the stickers.

It does not automatically follow, however, that one can automatically conclude that since Butters suspended him following the discussion about the stickers that the suspension was a violation of Section 8(a)(1) and (3). It is true that the trigger incident was the stickers matter, and that Butters mistakenly concluded that he had the right to order Ramos Tena to remove them. Ramos Tena however responded in a defiant way. Refusing to follow a direct order in the fashion that he did is an insubordinate act. See *Grand Rapids Die Casting*, 279 NLRB 662, 667 (1987) [union steward who was engaged in the protected activity of writing a grievance, was insubordinate when he refused to obey an order to return to work]. It seems to me that Butters' response to Efrain Ramos Tena's refusal was fairly tempered in the circumstance. He did not discharge Tena, but only suspended him for one day. That seems to be a relatively careful balancing of two competing rights. On the one hand, an employer has the absolute right to expect obedience to a rule or directive even if that directive infringes upon a protected right. The employee in that situation cannot be excessively insubordinate in defending what he knows to be his protected right. There must be a clear balance between the right of an employer to maintain order and discipline in the plant (*Kendall Co*, supra) against the employees' rights guaranteed by Section 7. Here, Ramos Tena defied Butters' illegal

order by refusing to act upon it after having been given the directive on four separate occasions. When he was directed to leave the plant, he refused to go. At that point, the insubordination overrode the protected considerations. Ramos Tena knew that the toolbox was his personal property and he also knew that John Kolkka would back him up on the question. He should have agreed to remove the stickers temporarily (after all, he had 30 more), discussed the matter with Kolkka and replaced the stickers after having demonstrated that the toolbox was his own. Instead, he became defiant and had to be removed by the police.

The 1-day suspension which was imposed was a punishment which fit the crime of insubordination. Furthermore, it was the type of discipline which would be expected in any insubordination of this nature. Accordingly, I do not find that the General Counsel has met his burden of proof required to demonstrate that the suspension violated the Act.[19]

4. The alleged constructive discharge of Efrain Ramos Tena

The Departure

Efrain Ramos Tena is alleged to have been constructively discharged in "mid-September 1996." There is no dispute that he resigned from employment. The only question is whether his resignation was forced upon him because Respondent had made conditions intolerable. In support of the contention that he was constructively discharged, the General Counsel has set forth a laundry list of incidents wherein Tena was supposedly mistreated during 1996, ultimately resulting in his decision to resign.

There is no question that Efrain Ramos Tena had engaged in a great deal of protected concerted and union activity beginning with the May 13 walkout. There is, however, a substantial question in my mind regarding whether he was any more visible in these activities than many other individuals. Even so, he was visible as a union activist. He wore a union button and in June he signed one of the petitions seeking better working conditions including timely and correct pay.

I think it is fair to conclude that John and Stephanie Kolkka, and perhaps Butters as well, had concluded that Efrain Ramos Tena had leadership skills. They knew that he was articulate and well spoken. At one point, recounted above, he had been considered for discharge over the May 13 walkout but was not fired as he was deemed to be a valuable asset. On June 20, about 3 weeks after the Union's petition was filed, he was called to John Kolkka's office where he spoke to both John and Stephanie. He says that they attempted to recruit him to campaign against union representation. He says John Kolkka asked him to tell his coworkers that the union organizers were gangsters who only wanted the employees' money. In addition, he says Stephanie offered him a manager's position together with "a very good salary." According to him, this 2-hour meeting was essentially a promise that if he took the company side in the upcoming campaign, he would be rewarded with a significant promotion and pay increase. Tena was suspicious of the offer and in any event had been one of the individuals who had urged union representation. Accordingly, he declined it. He continued with his union activism, and served as the Union's election observer.

He says that after the election, he was told that his supervisor would now be Butters, instead of John Kolkka. Although his testimony is unchallenged here, the documentation does not actually support it. His immediate supervisor still seems to have been Pedraza. It is true that he continued to work with John Kolkka on certain special projects, but Pedraza was at all times his direct supervisor. Certainly Butters did not take the time to perform that task. It should also be noted that Ramos Tena, insofar as the performance of his actual work was concerned, needed little supervision. He was highly skilled and well understood the requirements of his job.

In fact, he had great pride in his skills and he did not believe that either Butters or Pedraza was as skilled as he. He thought the only welder in management who was his equal was John Kolkka. However, he was entirely unaware that Pedraza had reasonably good welding skills. Efrain Ramos Tena assumed that because Pedraza had come from the grinding department to become a supervisor, that he knew nothing about welding. In fact, Pedraza had been the supervisor of both grinders and welders and is a good welder.[20] In addition, Butters himself had welding experience including working on stainless steel welds. However, Butters has not welded in over 20 years and does not regard himself as current in the skill. Nevertheless, Pedraza and Butters are clearly experienced and knowledgeable about all matters relating to welding.

The General Counsel has asserted that the welding required by Respondent is "sophisticated." Butters does not agree. He says it is relatively simply. Most of the welds are simply "spot" or connecting welds on furniture legs and decorations. These welds have nothing in common with truly sophisticated welds such as those found in pressurized pipes or vessels, although they must not undermine the beauty of the furniture.[21]

Thus, Efrain Ramos Tena's assessment of Pedraza as his supervisor is colored by either ignorance or some sort of professional jealousy. Certainly, he has no respect for Pedraza or Butters, believing them not to be his equal.

The General Counsel asserts that Respondent constructively discharged Efrain Ramos Tena because of the May 13 walkout, and after his refusal to join in the company's campaign against the union, that it subjected him to constant, arbitrary and onerous working conditions. These supposedly include the May 15 suspension previously discussed, the August 23 suspension previously discussed, assigning Ramos Tena to a supervisor

[19] Efrain Ramos Tena was not the only individual who was disciplined for sticker-related insubordination that day. Miguel Tena, a grinder and an individual who is specifically not alleged as a discriminatee, had placed stickers on company equipment, walls and his machine. According to Butters, he was directed to remove them and refused the direct order to do so. His response, according to Butters, was "insubordinate, abusive, and he refused to do anything we told him to do. . . ." Butters treated Miguel Tena's refusal to remove the stickers as a refusal to obey a direct order. Efrain Ramos Tena was not treated differently from other insubordinate persons who refused direct orders.

[20] Two of the General Counsel's own witnesses, Jose Chavez and Moises Estrada agree that Pedraza's welding skills are pretty good.

[21] Of course the welders also bend and shape metal parts under heat using the jigs. That skill is similar to, but not the same as, making metal connections as in a true weld.

(Pedraza and later, Butters) who could not understand his work, forcing him to perform duplicative work without compensation, and reducing his wages.

Also included in the General Counsel's list of Respondent's supposed mistreatment of Efrain Ramos Tena is an allegation that tools were removed from his toolbox and placed in the toolcrib, thereby depriving him of access to his tools. In actuality, Efrain Ramos Tena's tools were no different than the tools used by every other welder. Shortly after Butters arrived in 1995, he realized that individuals were not sharing them. He testified: "We had a limited number of tools, and a lot of the employees would take the tools and stash them somewhere. . . and we have two shifts, so the second shift might not have access to those tools because the day-shift employee had stashed them away somewhere. So I had to put in a toolcrib to monitor what tools we needed to buy so that we had sufficient tools for everyone and to kind of control who had what tools."

From Butters' point of view, Efrain Ramos Tena, by keeping tools in his toolbox was not complying with the toolcrib policy. His insistence on a uniform policy of tool distribution was a reasonable one and it was not applied to Ramos Tena in a discriminatory fashion, although Ramos Tena who was sensitive to such issues, believed that to be so. His reaction to being told to place his tools in the toolcrib was consistent with his belief that he was being mistreated, but his belief that he held a special position within the company contributed to his attitude of noncooperation.

First, although I did find the May 15 suspension to be violative of Section 8(a)(1), the August 23 suspension was lawful as discussed above. With respect to Respondent supposedly assigning him a supervisor who did not know what Tena did, the evidence fails to support that claim. As noted above, Pedraza knew his trade well enough and, if he made a mistake or two regarding some drawings as Tena says, it hardly amounts to much. Tena claims that as a result of the mistaken drawings, he had to do the work over again and was not paid for it. He also claims that his wages were "severely reduced."

A review of his employee earnings record does not bear out his testimony. Keeping in mind that welders in general are paid on piece rate basis, and sometimes on a hourly basis where their work did not lend itself to piece rate analysis, his pay was in large part calculated by the amount of work he produced. Thus, his pay rate fluctuates depending on the speed in which he is able to produce products. In looking at the period of time before the May 13 walkout, I observe that during each of the 2-week pay periods beginning in the first of the year, he earned between $622 and $854.[22] The pay period ending May 19 covered the period of time where Tena was off work because of the May 13 walkout as well as his suspension which followed. Nonetheless, for that pay period he received checks for $431.73 and another for $114.45 (a total of $646.18), actually exceeding the paycheck for the previous pay period ($506.75). Thereafter his paychecks remained in the same range as before the walkout. See the figures as set forth below.[23] The only reduction seems to be the pay period ending August 25, during which he had the one day suspension found to be lawful. Even so, that pay period slightly exceeded the pay period before it.

On September 1, Efrain Ramos Tena took his annual vacation, not returning to the facility until September 16. He says that about 3:30 that afternoon, he arrived at the plant in order to talk to John Kolkka. He found John Kolkka in the front office where Stephanie Kolkka's desk and bookkeeper Sherry Jones' office is located. Finding John Kolkka there, Efrain Ramos Tena told him that he wanted to quit the Company. When Kolkka asked why, he responded, "Because I don't want any more problem [sic] with the company, and I don't want any more problem [sic] with the union. So I want to take a break. I don't want any more problems with anybody. I want to leave because I have a lot of problems."

Efrain Ramos Tena went on to say that Kolkka told him that if he wanted to work the second (evening) shift or work part-time, that was fine with him, but Efrain Ramos Tena replied that he didn't want any more problems with the Company and he didn't want to work with Kolkka any more.

On cross-examination, Efrain Ramos Tena repeated the same reasons. He never asserted that his pay had been decreased, undoubtedly because it had not been.

In the circumstances, I am unable to agree with the General Counsel's contentions that Efrain Ramos Tena was constructively discharged. While it is true that he has suffered one instance of an unlawful suspension in May, the remainder of the General Counsel's claims of maltreatment are not supported by the evidence. Efrain Ramos Tena clearly over reacted to the claims that he was being supervised by incompetent supervisors, his suspension for insubordination was justified, and his pay rate and earnings have never been affected in any significant manner. To the contrary, if anything, his pay rate and his take-home pay increased during the period of his supposed maltreatment.

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[22] Payroll period end date: Net pay:

December 31, 1995	$617.70
January 14, 1996	137.32
	647.56
January 28, 1996	807.28
February 11, 1996	854.24
February 23, 1996	745.40
March 10, 1996	700.67
March 24, 1996	760.31
April 7, 1996	834.86
April 21, 1996	723.02
May 5, 1996	506.75

[23] Payroll period end date: Net pay:

June 2, 1996	$ 754.35
	91.55
June 16, 1996	874.37
June 30, 1996	917.20
July 14, 1996	899.78
July 28, 1996	1225.66
August 11, 1996	683.52
August 25, 1996	698.43

Crystal Princeton Refining Co., 222 NLRB 1068 (1976), established the Board's current rule with respect to the burden of evidence required to establish a unlawful constructive discharge. It stated at 1069:

> First, the burden imposed upon the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee's union activities.

Here, the General Counsel has not shown that there was really any change in Efrain Ramos Tena's working conditions. It may be true that Efrain Ramos Tena perceived there to be such changes, but objectively the only truly negative thing that occurred which was connected to any kind of unlawful activity on the part of the Company, was the May 15 suspension. Moreover, even with the two suspensions, the one of May 15 and the one of August 23, Tena was able to maintain the same level of earnings, despite being on suspension for 3 days in May and 1 day in August. His claim that he was supervised by individuals who did not understand his work is virtually nonsense. Moreover, the fact that his pay remained at the same rate or higher after the union organizing clearly suggests that he had sufficient access to his tools even with the toolcrib policy to perform his piecework in a timely, efficient manner. Certainly, the evidence does not show a change in his working conditions which would be difficult or unpleasant. Respondent imposed nothing upon him which was so difficult or unpleasant as to force him to resign. It is therefore unnecessary to even reach the second *Crystal Princeton* requirement that the burdens were imposed because of his union activities. Since no burdens were actually imposed upon him that issue is moot. The General Counsel has failed to meet the requirements of *Crystal Princeton Refining Co.* and Efrain Ramos Tena's constructive discharge allegation will be dismissed.

The Alleged Blacklisting

The General Counsel next alleges that Respondent blacklisted Efrain Ramos Tena from working with other employers because of the reference it gave him.[24] First, it should be observed that when Efrain Ramos Tena resigned, he agreed that John Kolkka told him to use his name as a reference and that he would give him a good reference. According to the General Counsel, the opposite occurred.

On December 8, almost 3 months after Efrain Ramos Tena resigned from Respondent, he filed a job application with the Cagwin and Dorward Garden Center, a landscaping contractor with an office in Daly City. Shortly after interviewing Ramos Tena, Cagwin and Dorward account manager, Mario Egan, was directed by one of his superiors to follow up on Ramos Tena's job application by making an inquiry with Respondent who had been listed as a job reference. Egan called the number and spoke to a woman, whose name he could not remember. He remembers that she told him that Efrain Ramos Tena was a good employee, was punctual and was a very intelligent person. He said that she mentioned that he also tried to start a union. In his pretrial affidavit, taken about 3 weeks before he testified, Egan said, "She also said something to the effect that the only problem we had with him was 'because he tried to start a union,' but I don't recall the exact words that she used." Egan went on to say in his affidavit that he "didn't care about that." He reconfirmed his lack of concern about Ramos Tena's union organizing in his live testimony.

Stephanie Kolkka says that she was the individual to whom Egan spoke. Her testimony on the conversation in its entirety is as follows:

> Q. (By Mr. Thierman): What, as best as you can recall, did you say to Mario [Egan] and Mario say to you about Mr. Tena?
>
> A. Well, he said that he was calling to—you know, that Efrain had applied for a job with the company that Mario worked for, and I didn't catch the company's name, so I wasn't aware of the nature of the work. And he asked if I would give Efrain a reference, and I said yes. And I told him that I thought Efrain was very smart and educated, that he was not prompt, but I felt that he was responsible, and he had always done a good job for us.
>
> Q. What else—did Mario ask you any questions or did you—Mario say anything?
>
> A. He asked me why he was no longer working for us, and I said that the reason Efrain had given is he had problems with us and problems with the union, you know, our company was in the middle of a—had been in a union campaign, and Efrain felt he had problems with the union.

It appears, from an amalgamation of their testimony, that Stephanie Kolkka's and Egan's recollections are not greatly different. Indeed, given the fact that Efrain Ramos Tena had in almost haec verba said to John Kolkka what Stephanie told Egan, it is likely that she repeated fairly accurately what Efrain Ramos Tena had told him when he quit: *[". . .Because I don't want any more problem [sic] with the company, and I don't want any more problem [sic] with the union. So I want to take a break. I don't want any more problems with anybody. I want to leave because I have a lot of problems."]*

Accordingly, it does not appear that Respondent was blacklisting Efrain Ramos Tena in the slightest. Since he had quit, rather than having been fired, Stephanie Kolkka had no real concern with respect to supplying the reasons Ramos Tena himself used at the time of the quit. That was in direct response to Egan's request for information on point.

Based on the foregoing, I cannot conclude that Respondent in any way attempted to blacklist Efrain Ramos Tena. There is no doubt in my mind that Egan, charged with pursuing the reference, would not have asked about the reasons why the applicant had quit his previous employment. Furthermore, it seems unlikely that Stephanie Kolkka would have volunteered those reasons immediately after giving Egan a reasonably honest and positive assessment of Ramos Tena's workmanship and his work habits. Egan reported that she told him Ramos Tena had been a good

[24] Par. 7(f) of the complaint, as amended, asserts that Respondent sought to blacklist Ramos Tena by giving a prospective employer an unfavorable reference about him. In this regard, the General Counsel has asserted on the record that it does not seek a backpay remedy for that act, if it occurred. Thus, the only remedy sought here is a cease-and-desist order.

worker and that he was intelligent. It appears most likely that the discussion regarding Ramos Tena's union activity was solely an afterthought, triggered by Egan's own question, a perfectly natural one, regarding why the employee had quit.

Accordingly, the evidence does not support the allegation.[25]

5. Saturday work

The General Counsel asserts that sometime in June (date unknown), Respondent changed its policy from giving employees optional work on Saturday to mandatory work on Saturday. In furtherance of that change, Respondent supposedly gave Francisco Barajas a disciplinary warning in June for not working on Saturday. Respondent denies that it changed its policies in June. Furthermore, it denies that it gave Francisco Barajas a disciplinary warning in June, agreeing that it did give him one in September for a breach of the policy. It also asserts that the policy had been modified in the latter part of 1995 after Butters became the manager and long before the employees began engaging in any protected conduct.

Francisco Barajas testified, somewhat in response to a leading question, that he had a discussion with his supervisor, paint shop supervisor Jessie Souza on a Friday in June. He says Souza told him and others that there was work on Saturday for those who wanted to come in but it was not mandatory. Francisco Barajas says he told Souza that he would not be able to come. The following Monday he received a warning for not appearing for work on Saturday. He claims he asked Souza why he was getting the warning "if I had [not] agreed to come on Saturday." According to Francisco Barajas, Souza replied that it was now mandatory to work on Saturdays.

He continued: "At that moment, he (Souza) spoke to me about the union. I didn't speak to him about the union. . . . he told me that he had been in a union previously. He told me that they had met to organize some workers, and that he had been fired. . . . He told me that the union was not going to do anything, that the union was going to take our money away. That the union was of no use. . . ." In addition, Francisco Barajas asserts that at the time of the conversation, he was wearing either a union button or union hat or both.

From the context, as described by Francisco Barajas, it is clear that he is asserting that this conversation occurred shortly after the election petition had been filed.

The only evidence, aside from Francisco Barajas' testimony, that a warning was ever levied against him by Souza occurred on September 21, 6 weeks after the election was over. When Barajas was confronted with that warning, he became confused and could not explain that date. Yet, his personnel record shows no other warnings given, whether in June or any other time. The warning itself refers to a failure to appear or call on an appointed work schedule. The General Counsel and the Union argue that this is not specific enough to relate to a refusal to perform Saturday work, but I observe that September 21, 1996, was a Saturday and that Souza signed it on Monday, September 23. Accordingly, I conclude that the Souza warning of September 23 specifically relates Francisco Barajas' refusal to work on Saturday.

That raises the immediate question of whether or not Barajas' testimony is credible at all. Souza would have no reason to engage in an antiunion polemic in a preelection posture in late September. The election had been over for 6 weeks and Souza would not need to persuade or coerce anyone at that stage.

It is apparent to me that Francisco Barajas' recollection here is poor. Indeed, in other testimony he was unable to recite dates with any accuracy. At one point, he guessed that the May 13 walkout occurred on May 25 or 26 even though he had been led to May 13 in a preliminary question.

Frankly, as his surrounding detail relating to the discussion regarding the warning is objectively incorrect, his testimony regarding the discussion concerning the warning is highly suspect.

This can be contrasted with Butters' testimony regarding the Saturday work policy. He says the Company has a policy of asking for volunteers if Saturday work is needed, and once an employee agrees to work on Saturday, he is expected to work that day. If they don't appear for work then obviously work doesn't get performed. In that situation, he says, the company will take disciplinary action. Butters testified that Barajas was given a disciplinary warning by his foreman, Souza, because he had volunteered for work on a Saturday in September and had failed to appear.

The General Counsel argues nonetheless that the warning was a departure from past procedures. That argument is not supported by any evidence. There is only Francisco Barajas' testimony that Saturday work had been voluntary, but that does not address the question of what happens when someone volunteers for Saturday work yet fails to appear. Furthermore, there is no showing that the policy as articulated by Butters was not well ensconced by the end of 1995 or even earlier. Thus, the General Counsel has not shown that the policy was a change at all. It has failed utterly to demonstrate what the policy was prior to the alleged change. In any event, it is relatively common sense that an employer has the right to rely upon an employee who says that he is going to appear for work but without notice fails to do so. Frankly, that is nothing more than an unexcused absence. It should be no surprise when such an absence draws some sort of discipline. Here the discipline was reasonable, a simple warning. This allegation should be dismissed.

6. The alleged "wage" reduction

The complaint originally contained two allegations regarding reduced compensation. The first, paragraph 25(a) which had alleged that in June Respondent reduced the piecework rate,

[25] Efrain Ramos Tena asserted that he had been denied the job at Cagwin and Dorward because of the bad reference he had been given, claiming that a job offer had been made and subsequently rescinded. But Egan testified that he never spoke directly to Ramos Tena after the initial interview. I do observe that attached to Efrain Ramos Tena's application form is a motor vehicle report issued by the California State Department of Motor Vehicles which notes four license suspensions in 4 years for four accidents. A handwritten note on the form notes that the applicant had "poor driving record, no previous experience." Since the job would have required driving a company vehicle to a landscaping location, his driving record undoubtedly disqualified him from employment with that firm. I conclude that Cagwin and Dorward never made an offer of employment to Ramos Tena, contrary to his testimony. It follows that no rescission occurred either.

was withdrawn on the record on May 7, 1997. The second, paragraph 25(d), as amended, asserts: "On unknown dates after August 9, 1996, Respondent decreased wages on the piecework rate of compensation it paid its employees." That conduct is alleged to have violated both Section 8(a)(3) as a reprisal for the employees having chosen union representation and the August 9 election and is also alleged to be a violation of Section 8(a)(5) as a unilateral change, since the Union was ultimately certified as the 9(a) representative. The paragraph itself is unhelpful and to some extent misleading. It refers to the entire staff, but in brief the General Counsel has picked and chosen specific individuals whom it contends were the principal union activists. When Respondent provided mathematical averages of the staff which showed that the average wage actually increased after the election, the General Counsel sought to rebut that figure by focusing on the pay period immediately following the election. That, of course, is a departure from the complaint's allegation and is statistically unreliable. Moreover, it appears that the General Counsel was taken in by the incorrect oral testimony of at least one of its witnesses, Francisco Barajas, whose credibility has been discussed above. In his testimony, he contended that prior to the election, his average pay was $700 per pay period and that after the election, it fell to about $600. It will be recalled that Francisco Barajas was a painter who was paid on piece rate basis. His entire earnings are set forth in two different places, one of which is Respondent's Exhibit 30(a)–(z), covering the entire year of 1996. A perusal of that exhibit, which includes every piecework report which he filed that year, demonstrates several things. The first is that his preelection paychecks averaged slightly less than $640 per pay period. Second, it is true that his post-election paychecks average slightly less than $620 per pay period. In this regard, however, it should also be observed that before the election, his paychecks ranged from about $400 to a high of $950. After the election, they ranged from about $440 to $871. The normal fluctuation is quite remarkable. A further perusal of that exhibit demonstrates that the paycheck variance is explainable by the amount of pieces which the employee chooses to produce in a given pay period (and to some extent on the number of days he is able to work during a pay period; yet another variable is the value of the job which is being performed). Occasionally, he was assigned a large number of pieces, but the value was small. Indeed, the value of pieces ranged from $9.50 to as high as $352. Curiously, however, despite the fact that the postelection paychecks averaged $20 less than the preelection paychecks, the check covering the first full pay period after the election was for $834, certainly not evidence of an immediate negative response to the election's outcome.

In its brief, the General Counsel has taken a statistically insignificant period of time, and drawn an average and compared them. Furthermore, it calls the figure "hourly piecework" rates, a nonexistent term. Individuals employed as welders or finishers (painters) were paid on a piecework basis during this period, unless they were assigned to a specific job which carried an hourly rate. In any event, the General Counsel has chosen to compare May 20 through August 11 with August 12 through September 8. The first period covers six pay periods while the second covers three. Given the fact that there are a large number of variables which can affect a piece rate employee's production, in my opinion the most valid method of comparison is to take longer periods of time for comparison purposes. These variables include the number of days in a pay period, the number of days the employee worked during a pay period, the nature and complexity of the pieces assigned to him, and the speed at which an individual employee chooses to work. In this regard, again looking at Francisco Barajas, Respondent prepared two exhibits covering the entire calendar year 1996. The first, Respondent's Exhibit 32, covers his annual piecework. It shows that his piecework before the election averaged $626 per pay period whereas after the election, it averaged $644, an increase of $18 per pay period. Respondent's Exhibit 33, which took into account some hourly earnings, continues to show a preelection average of $626 whereas the postelection average increased to $652. The latter is an increase of $26 more per pay period.

Standing alone, the Francisco Barajas figures are not particularly significant to proving or disproving the General Counsel's allegation. For that reason I have undertaken an independent review of the annual payroll sheets which were presented in evidence covering 18 other individuals. All of these were persons who performed piecework of one sort or another for Respondent. All of them also to some extent were paid for other work on an hourly basis. One of the variables which the General Counsel does not want to look at is the amount of hourly pay and its effect on the total take-home pay of each person. Instead, the General Counsel wants to focus solely on the piecework aspect. The piecework as I have already noted, is subject to a large number of variables. A review of those documents leads me to the conclusion that focusing solely on the piece rate issue is misleading. What is really important, it seems to me, is the total amount of money an individual takes home each pay period. For that reason, I have carefully reviewed the remaining paysheets to determine what the average pay per pay period was of each of the individuals whose paysheets suggest a statistically valid comparison.[26] There are some individuals who for various reasons do not present valid preelection and postelection comparisons. They are set forth in the footnote below.[27] A review of the remaining 15 individuals shows that that 12 had an increase in take home pay in the period after the election, while 3 suffered a decrease. Two of the

[26] In performing the averages, I excluded both vacation pay and the overtime makeup, where applicable, which had been ordered by the State Labor Commissioner in June. I also excluded where appropriate, pay periods which had not been worked or which were significantly low due to the individual's not having worked an entire pay period, deeming those weeks to be unrepresentative of the individual's work history.

[27] The individuals are: Raul Alaniz, who shows a postelection average increase in his paycheck of $383 due to the fact that he only worked for four pay periods after the election and two of those contained abnormally high earnings; his figures are statistically invalid. Jesus Cortez, who only worked three pay periods after the election, one of which was abnormally low. Alexander Prado, who shows a $306 average increase after the election, but who had primarily been an hourly worker until he began performing piecework in September, thus dramatically improving his average. He is not statistically reliable either. Efrain Ramos Tena, discussed above, who had only one full pay period after the election.

twelve are Sergio Barajas, whose average paycheck increased by $200, and Octavio Barajas, whose average paycheck increased by $154. The only Barajas brother who suffered a decrease was Roberto, who fell by $159. There is no clear explanation for that. I do observe that the lowest paycheck that he had in the postelection period was $386 which was only $14 lower than his lowest preelection paycheck.

The other two who suffered postelection paycheck average decreases were Jorge Rocabino, whose postelection average fell by $53 and Jorge Garcia, who fell by $42. Of the 12 who had average pay increases, Sergio Barajas' $200 was the leader; the lowest was Luis Vega, who paycheck averaged only $2 more than his preelection paychecks. It was not uncommon to see average increases of more than $150: Octavio Barajas was $154, Jose Bracamontes $154, Victor Mendoza $162, and Jose A. Tena $171.

Thus, the total take-home pay figures do not support the General Counsel's contention that the pay was somehow reduced after the election. The evidence shows to the contrary. Moreover, the General Counsel's figures as noted before, focus on the pay period immediately following the election and even there the facts are not conclusive. Some are up, some are down and it seems to me those variations are typical of what one would expect where piecework performance was a significant part of an individual's earnings. Accordingly, the allegation that Respondent somehow reduced the paychecks, through the manipulation of the piece rate work, should be dismissed. It just didn't happen.

7. The so-called arrest of union organizer Jay Bradshaw

During the course of the Union's effort to organize Respondent, it had conducted weekly demonstrations in front of Respondent's facility, as well as engaging in product boycott activity at retail outlets which sold Respondent's products. The demonstrations were sometimes vociferous and disruptive of the public peace. As a result, Respondent was able to obtain from the State court system a restraining order which limited the locations and numbers of individuals who could participate in the picketing/patrolling of the areas involved. One of those areas was Respondent's plant itself, located at the corner of Kaynyne and Bay Streets in Redwood City. The restraining order in effect there barred the Union from approaching within 20 feet of each of the two entry doors located on each of those streets. Thus, the Union was able to picket by patrolling the sidewalk in a circular fashion between the corner and each of the two doors, so long as they stayed 20 feet away from the doorways. At least one of the doorways was recessed from the sidewalk by a small alcove. That doorway, which opened to the outside, was often propped open during warm weather. On the interior of the door, Respondent had affixed some material which, although protected by Section 8(c) of the Act, was nonetheless offensive to the Union. The General Counsel characterizes it as "derogatory" but there is no direct evidence regarding what the poster actually said. It may have been the "unionius goonis" flyer and it may have been a newspaper article describing union corruption, or both.

In a warm afternoon on November 14, the Union conducted a demonstration at the corner. As usual, it was vociferous, with Bradshaw leading chants with a bullhorn.

At some point, apparently midway during the demonstration, the poster, visible on the inside of the doorway which had been propped open, was torn and fell to the ground. The facts regarding how that poster came to be torn and thrown down, are in significant dispute. Alicia Williamson, John Kolkka's assistant, asserts that from inside the building she observed Bradshaw enter the doorway and tear the poster down. She is corroborated in part by a custodian, John Whipple. Bradshaw denies the incident in its entirety and is corroborated by his fellow professional organizer, Patrick Dennis. Williamson called the police, who responded with a squad car. Two officers investigated the circumstances, first speaking to Williamson and then to Bradshaw. Eventually, based upon Williamson's assertion that she had observed Bradshaw enter the doorway (thereby breaching the restraining order), entering the alcove (thereby perhaps committing a trespass) and tearing the poster (thereby possibly committing an act of vandalism), asked Williamson if she wanted to make a citizen's arrest. Under police procedures, since all of these acts were misdemeanors which the officers had not observed, they could only rely upon witnesses who had seen the conduct. Williamson asserted that she wanted to do so, and a citizen's arrest was effected. The entire scene occurred down the block near where Bradshaw had parked his car, and was some distance from any of the main entrances or from some of the doorways which were used by employees in the course of their duties. No demonstrators or employees were within earshot of the conversation. The officers did not take Bradshaw into custody, but after Williamson returned to the building simply wrote him a citation, similar to a traffic citation (indeed it was the same form), requiring him to promise to appear in a local municipal court at a future date. After Bradshaw signed the promise to appear, the officers left. The demonstration had ended several minutes earlier and most had departed while Bradshaw and the officers were speaking.

The General Counsel asserts that there were two Kolkka employees who may have observed what was going on from one of the doorways, but there is no direct evidence that any employee actually knew what was transpiring. No employee testified on the point.

Eventually, the San Mateo County District Attorney's Office determined that it was not a case which it wished to pursue and dismissed the matter.

The General Counsel asserts that this conduct amounted to an 8(a)(1) violation as it occurred in the presence of employee witnesses. The problem I have with the theory is that hardly anyone knew what was happening, although Bradshaw did inform Dennis and Dennis waited around to see what would happen. The employees who supposedly could see from the doorway have never been identified and the evidence that they were even there seems to be speculative at best. There is no proof that even the demonstrators (who were probably statutory employees of someone else), knew what was transpiring between Williamson, Bradshaw, and the officers.

I observe that the police officers acted on what would appear to be a reasonable view of the facts. It may well be that Brad-

shaw and Dennis are correct that Bradshaw did not engage in the activity which Williamson and Whipple say they saw. Yet, calling the police in that situation is reasonable as a breach of the peace had appeared to them to have occurred. The General Counsel asserts that neither Williamson nor Whipple are credible individuals, but whether they are to be believed in the final analysis is beside the point.[28] Williamson appears to have acted reasonably and there seems to be some evidence to support her contention. That it did not result in a criminal prosecution is of little significance in the circumstances. It cannot be said that Williamson's decision to effect a citizen's arrest was without support or fabricated.

However, the principal reason for dismissing this matter is not whether either of Williamson's or Bradshaw's opposing versions are to be believed, but because Bradshaw was not taken into custody or even restrained. An employee, if there was one, who observed the entire scene would only have been seen the police officer speaking to Bradshaw in a calm, reasonable way. One may even have seen the officer write the citation or hand it to Bradshaw. As it was a traffic style citation, an employee might well conclude the police officer's handing Bradshaw a citation had nothing to do with his union activity. From that distance it might have appeared as benign as a parking ticket, a warning or some other kind of note.

Accordingly, as the General Counsel has not shown any probable impact upon the employees in this incident, it must be dismissed. There simply has not been any proof of interference with, restraint or coercion of employees in the exercise of Section 7 rights. I recommend that this matter be dismissed. *W. T. Grant Co.*, 209 NLRB 244 (1974); *Hempstead Motor Hotel*, 270 NLRB 121, 123 (1984).

8. Paycheck distribution

Prior to the August 9 election, Respondent had released paychecks on Friday afternoons. Those checks became available to the night-shift employees at 2 p.m., allowing them to come in prior to their 4:30 p.m. start time and permitting them to negotiate their checks with a financial institution. It is uncontroverted that at some point after the election, although the date is not clear, Respondent began issuing the checks to everyone at 4:30 p.m., the time of the shift change. This created a hardship for the night-shift employees who were then unable to leave to negotiate their checks.

The General Counsel asserts that this change is both an animus-based violation of Section 8(a)(1) and a unilateral change in violation of Section 8(a)(5), as the Union was subsequently certified as a result of the election.

Respondent does not contest the facts, but asserts that the change was simply done as a matter of convenience to the business office.

The General Counsel has not presented any evidence that the change was in retaliation for the employees having selected the Union in the election. Indeed, it appears to me that from Respondent's point of view, the election was still in doubt as the objections and challenges had not yet been resolved. It seems unlikely therefore that the change was in retaliation for the employees selecting the Union. I shall therefore dismiss that portion of the allegation. However, as the Union was eventually certified, based upon a majority of the voters having chosen the Union, and as that choice occurred on the election date, the majority status of the Union is retroactive to that day. *Mike O'Connor Chevrolet-Buick-G.M.C.*, 209 NLRB 201 (1974), enf. denied on other grounds 512 F.2d 684 (8th Cir. 1975). The Board has long held that an employer makes unilateral changes after an election at his own risk. Accordingly, I find that Respondent did violate Section 8(a)(5) of the Act when it changed the release date. It should have given the Union notice and bargained with it over the matter before finalizing the change.

9. Demands for information

After the Board issued its decision of December 16 overruling the objections and directing that challenged ballots be counted, the Regional Office, on December 31 counted the challenged ballots and issued a revised tally showing that the Union had won the election. The certification of representative followed on January 7, 1997, but even before it issued, the Union on January 3 sent Respondent a letter requesting that Respondent provide it with certain information. That letter first requested information regarding the layoffs of four of the five Barajas brothers which had occurred on December 30, including correspondence between the Company and the Social Security Administration and notes regarding the discussions which the Company had had with officials of the Social Security Administration. Second, it requested information fully aimed at preparing to negotiate a collective-bargaining contract. This included any plans the company may have had regarding subcontracting work, a copy of the company policy handbook, a list of employees, including their wage rates and job classifications, their dates of hire and the benefits which they currently received as well as other policies relating to wages, hours, and terms and conditions of employment.

Subsequently, Bradshaw, on two occasions, telephoned Respondent but as soon as he identified himself, whoever he was speaking to hung up the phone. This resulted in a second letter being sent on January 27 repeating the request for the same information. Respondent never replied to either letter.

Clearly the union is entitled to all the materials relating to preparing for collective bargaining and the denial of that information is a clear violation of Section 8(a)(5). *Adair Standish Corp.*, 283 NLRB 668 (1978); *Interstate Food Processing*, 263 NLRB 303 (1988); *American Commercial Lines*, 291 NLRB 1066 (1988). A remedial order is therefore required in this regard.

The same cannot be said, however, for the demand for information regarding the discharge of the Barajas brothers. I shall deal with the actual terminations below but it should be observed that both of the letters which demanded information about those discharges occurred after the filing of the unfair labor practice charge in Case 20–CA–27606, which was filed on December 31, 1 day after their discharge. It is clear to me that the demand for information here was simply designed as a discovery tactic for either proving to the Regional Director that the charges had merit or proving to an administrative law judge

[28] Whipple's affidavit describing the incident was quite belated, being filed with the district attorney's office after an initial dismissal.

that the discharges were unlawful. Requests for information in that circumstance are not honored by the Board as they are simply being used as a substitute for discovery. See *WXON-TV*, 289 NLRB 615, 617–618 (1988), and *Union-Tribune Publishing Co.*, 307 NLRB 25, 26 (1992). That aspect of the allegation will be dismissed.

10. Moises Estrada

Another alleged violation is the shift change imposed upon Moises Estrada. This specific allegation was added during the course of the hearing based on Case 20–CA–27756–1 which I consolidated with the earlier cases by order of June 20, 1997. It asserts that Respondent violated Section 8(a)(1), (3), and (5) by its treatment of night welder Moises Estrada. It asserts that Estrada is a significant union activist and that the transfers in question were an unlawful response to his union activism. The complaint also asserts that in changing his shifts, Respondent violated Section 8(a)(5) of the Act because it did not notify the Union in advance, thereby failing to give it an opportunity to bargain over the question. Specifically, the complaint alleges that on April 7, 1997, Respondent transferred Estrada from the night shift to the day shift. It then asserts that a month later Respondent violated the Act again when it transferred him back to his regular duties on the night shift.

Respondent admits the salient facts but denies that there was either discriminatory motive or a duty to inform the Union about the change. Instead it asserts that Estrada was merely transferred to the day shift for 30 days "training;" then upon the end of that 30-day period, he was transferred back. Respondent is of the view that it has the right to bring employees from the night shift to the day shift for the purpose of ensuring that those employees know the products which the Company manufactures and to give them an opportunity to improve their skills. Those skills primarily relate to assuring Respondent that the employees on the night shift have the ability to fabricate the metal parts for various types of tables and beds. Furthermore, it asserts that Estrada had been given about 90 days notice of its intentions.

The facts demonstrate that Estrada had worked for Respondent since May 1994 and that he had consistently worked only the night shift. Although it is clear that Estrada had engaged in the same union activity as everyone else who was an activist, i.e., wearing buttons, participating in demonstrations and attending the Union's coffee breaks, by early 1997 he was no longer wearing the button very frequently. Between late December and March 24, 1997 organizer Luis Solares had not visited the plant. However, on March 24, about a week before the hearing in this matter began, Solares once again came to the plant during the shift change and spoke to five or six employees, including Estrada. Solares handed out additional union buttons and Estrada put one on his uniform and wore it that night. Some of the others did too, but Estrada says they eventually took them off "for fear of reprisal." It is unclear what Estrada meant by that testimony, as he did not testify that any supervisor spoke to him or anyone else about the buttons that night. I conclude that he believes he got some sort of "dirty look" from Night-Shift Supervisor Flores. Yet, he would not testify to it.

He says later that evening Flores advised him that he was going to change Estrada's shift. Estrada asked Flores if it was over the button, but Flores simply replied, "No, it was an order from John Butters," and that several of the welders would be changed to the morning shift. Estrada concedes that Flores told him to report for work on April 7 at 8: a.m. for that shift. On the following day, Estrada reported that directive to Solares in the parking area. He claims that Butters, Pedraza, and Frederico Moreno, all supervisors, observed him as he reported this to Solares. It is clear, however, that if they did observe Estrada, they could not hear what he was saying to Solares.

Later, sometime during the same week, he had a conversation with Flores and Pedraza in Butters' office. He says he asked why they had chosen him instead of any of the other four or five night welders. He says they told him his "turn had come up" and they were going to change some other people like Peña and Cuevas. They simply told him he was the first. He again asked if it had something to do with the button but they said it did not.

Estrada says that he then told Flores and Pedraza that he had a day job, working part time at a café and observed that if he had to work the day shift, it would interfere with the café job. He says that several days later, he showed them a letter he had obtained from his daytime employer, but Flores "just laughed" and took it to Butters. Flores came back a few minutes later to tell Estrada that he still needed to report at 8 a.m. on April 7.

Curiously, Estrada could not remember the name of that café, saying only that it was located in Mountain View.

On April 7, 1997, Estrada did not report to work at 8 a.m. as directed saying union organizer Solares had told him not to. Instead, he came in at his usual starting time of 4:30 p.m. Flores told Estrada that he could not report to work that night but to report to work at 8 a.m. Tuesday morning, April 8. The following morning, he did not report until 9:30 a.m. but then continued to work the day shift without incident until May 5 when he returned to the night shift.

Of his experience on the day shift, Estrada claims that Pedraza did not supervise him and did not train him in any significant way, but he does concede that he had to perform his job somewhat differently. He had to prepare his own material by cutting it, a function which he did not perform at night and he also had to polish the metal and set up the piece and put it together. He agreed that on nights, an employee did 100-percent welding and none of the fabrication work which was required for daytime work. He also claims that he was paid by the hour and that the transfer meant "more work and less money." The accuracy of that statement is open to question. He also says that he lost his daytime work at the café due to the requirement that he work for Respondent during the day. He says he quit that job.

Estrada also testified that at one point during May (more likely April) 12 or 13, 1997, while working on the day shift, he had a conversation with John Butters.[29] He says that he was so con-

[29] Estrada seemed to be confused about the date of the conversation with Butters. At one point he testified that it was during the day shift; at another he said that it was on May 12 or 13 and later he asserted that he really meant April 12 or 13 because it occurred during the day shift.

cerned about the conversation that he insisted upon an interpreter who was not connected to management. In any event, he says he told Butters that he was unhappy with the shift change. He says Butters replied that he wanted Estrada to learn more so he could make more money. Estrada said that he responded there were other people who could do it really well, accused the Company of lowering the prices on the pieces, and then said that he wasn't interested in learning. He told Butters that if he was going to learn, no matter what, it would require him to do more work but earn less. He also observed that the Company had fired some people and he wasn't interested in learning more. When Estrada was asked what Butters replied, he did not testify about Butters' reply, if any; instead, he says he told Butters, "If they wanted to fire me, go ahead and do it, like they had done with the Barajases." Estrada says Butters replied that Roberto Barajas had been fired because his social security number was not in order and that it was no kind of reprisal.

On May 5, Pedraza told Estrada that his month of training in the mornings was over and that on the following workday he could report back to his night shift.

Despite his testimony about the difference in the jobs, Estrada claimed that he learned nothing new and to the extent he needed to ask questions, he asked his coworkers who had been with the Company for a longer period of time. He does concede that Pedraza assigned him work but says Pedraza did not "train" him. He claims that Pedraza simply went off and did other things while he worked alone. And, he says, once he was back on the night shift, the duties which he performed were the same as he had always performed, implying that his day-shift training had not given him any better skills nor was he assigned to tasks which utilized the skills which he had been exposed to during the day.

On cross-examination, Estrada was defensive and argumentative. Among other things he refused to acknowledge that his training period had actually resulted in a higher pay rather than lower. During the pay period prior to the transfer, he had earned only $590 (gross) but during the two pay periods of training on days, he earned $10 an hour, as he was not expected to be able to produce at the same rate as the more experienced day-shift custom welders. The $10 rate meant that he earned $800 (gross) per pay period. He says the reason the preceding paycheck was so low was because he had missed a day and it was not for a full 80 hours. Yet the attendance sheet does not support him. Instead, it shows that he had some tardies and that he had worked a partial day for personal reasons (March 28), but the record does not show how many hours he actually did work.

Whatever the reason may have been, it seems unlikely that the low paycheck for that pay period had much to do with attendance. What is significant is that the $800 pay periods which followed on the day shift hardly qualifies as an issue of "more work, less pay" as he had testified to on direct. In addition, he, like the others, accused Pedraza of not being a qualified welder or trainer.

That assertion sounded hollow to me when I heard it, but during Respondent's case, Pedraza's training log was presented in evidence. Any review of that log clearly demonstrates that Pedraza took a great deal of time and oversight with Estrada. The log is detailed and to the point. While not minute for minute, it certainly appears to be a credible recitation of the assignments, the commentary and developmental points. Furthermore, Estrada finally conceded that there was a significant difference between the custom work in the daytime and the evening work. He had already agreed that during the day he was obligated to do his own cutting and polishing, but on cross-examination he finally agreed that he only performed production work at night, using precut parts. It was far more of an assembly line situation. In those circumstances, he had no obligation to measure or follow a specific design or plan. Yet, during the days those were the exact matters upon which he was trained. Still, in reference to that work, which he seems to have preferred over day work, he said, "Lots of work and not too much money."

Curiously, the General Counsel called Jose Chavez, who is a day-shift welder with over 12 years' experience to testify that Pedraza was not particularly skilled as a welder and therefore, was not a particularly good training official for Estrada. Yet, Chavez admits that he was the one who answered Estrada's questions and helped when Estrada had problems during that 30-day period. Rather clearly, that testimony supports Respondent's view that it was only on the day shift where an employee could receive appropriate training on the custom style pieces.[30] Perhaps making a mentor available like Chavez was the best choice.

Also on cross-examination, Estrada conceded that some of the work he had learned how to do during the day has, in fact, been assigned to him at night, specifically, special work with respect to an Apex table. Furthermore, some of the grinding training which he practiced during the day is required of him at night. Finally, he agreed that since the departure of Sergio Barajas from the night shift in late December, there was only one individual left on the night shift who was able to do special orders. His testimony suggests that Respondent wanted to have at least two individuals on the night shift who could perform those duties and that the daytime training which he had just undergone was designed to improve the night shift's capabilities in that area.

Finally, with respect to his general credibility, cross-examination demonstrated to my satisfaction that he was less than forthcoming about the so-called daytime café job which he says that he was forced to abandon in early April. On cross-examination, he continued to be unable to remember the name of the café until Respondent counsel suggested "Starbucks" to him. Even then, Estrada did not immediately agree that the café was Starbucks, seeming to be at a loss, despite the fact that he says that he had worked there on and off for 30 days before being forced to quit. When Respondent asked him if he had any paystubs from that company, he said that he had "destroyed" them and that he normally destroys paystubs, includ-

[30] It is also true that Chavez does not appear to be particularly impressed with either Pedraza or Butters as individuals who understand the work. Even if they did not understand it, which I do not find, it does not follow that assigning an individual to the day shift so that he can undergo supervision by a manager was done for illegitimate purposes.

ing those issued to him by Respondent. Choosing the word "destroy" in reference to paystubs is curious indeed.

Taken as a whole, Estrada's entire testimony, including that given on direct, regarding his supposedly holding a daytime job with a café which he was forced to abandon, seems to me to be a entirely contrived circumstance. It did not ring of honesty even before I heard Respondent's testimony on the point. Estrada's lack of probity on that issue casts real doubt on his claim that he first learned that he was being transferred on March 24. In Respondent's case, Butters testified that in early January he made a decision, based upon his discussion with the supervisors that two of the night-shift welders, Estrada and Rodrigo Cuevas needed some additional training. That decision was relayed to Night Supervisor Fernando Flores. Although Flores did not testify, Butters testified that he received a rapid memo from Flores dated January 7 in which Flores reported that he had advised Cuevas and Estrada that one of them might be switched to the day shift. He said he told them they needed to learn some custom work and besides, the day shift needed help.

Butters says it was shortly thereafter he chose Estrada over Cuevas based upon his supervisor's report that Estrada could use the training more.

On March 21, Flores wrote another rapid memo to Butters advising that he had told Estrada that day for the second time that he would be put on the day shift as of April 7. He also reported that he had told Estrada that it was for training purposes and that it would only last from 1 to 2 months, depending on how well he was doing.

On Friday, April 4, according to Pedraza, he had the discussion with Flores and Estrada. During that conversation, he says Flores reminded Estrada that his next day of work was Monday, April 7 and that he was to report at 8 a.m. He also heard Estrada reply that he would not come in because he had a job. Flores told him that he had not brought proof of such a job, again observing that the transfer was only for a 1-month training period. During the course of this conversation, according to Pedraza, Flores told Estrada that this was the third time that they had talked about it. In fact, says Pedraza, Flores told Estrada that he had first advised him of the change some 3 weeks before and that he had been reminding him every Friday, including April 4.

When, on April 7, Estrada did not come to work, Pedraza, obviously not knowing what to expect next from Estrada, wrote a memo detailing the entire conversation which had occurred on Friday. That memo is consistent with his testimony. It includes a remark made by Estrada threatening not to show up on April 7 "because it is not in my contract."

Based on the foregoing facts, I conclude that the decision to require Estrada to spend at least 30 days on the day-shift training and learning to perform custom type work was made as early as January 1997 and that Estrada was informed of that possibility shortly thereafter. His claim that he was not informed of the decision until March 24 is rejected. He is simply not credible on the point and he has displayed a resentful defiance over the decision. It is apparent that his testimony is an effort to strike back at what he perceives to be an unjust requirement. However, contrary to his perception, the decision was well grounded in good business principles, and was not based on antiunion considerations.

Respondent has argued that it makes no sense to train an individual to perform new tasks in order to punish him for his union activities. That argument is both persuasive and consistent with the facts as they developed. Accordingly, insofar as the complaint alleges that Respondent violated Section 8(a)(3) with respect to the transfer, it should be dismissed. I think it is fair to say that while there does appear to be some union animus in the background during the organizing drive, it was never specifically directed at Estrada and his personal fears about his union activities are a bit overblown. The only animus which he could point to was an alleged "dirty look." The only other supposed evidence of animus with respect to Estrada is the discredited claim that Respondent caused him to lose the daytime job at the café.

Assuming that a dirty look is sufficient to support a violation of Section 8(a)(3) (an assumption I do not make), the fact remains that Respondent had made the decision to send him to the daytime shift for training purposes in January. Moreover, it gave him ample notice, apparently as much as 3 weeks, with respect to the April 7 start date, certainly an adequate time for Estrada to prepare. Moreover, Estrada even provided Respondent with an excuse to discharge him had they wished. He refused to report to work on April 7, a violation of a direct order and clearly an insubordinate act. Yet, Respondent reacted rather mildly, and simply told him to report the following day. It was not even upset over the Tuesday tardy. Clearly Respondent did not have union animus insofar as this particular transfer was concerned.

Alternatively, the General Counsel has claimed that the transfer of April 7 and the retransfer of May 5, both violate Section 8(a)(5) as an unlawful unilateral change, for it did not give the Union notice and an opportunity to bargain. First, there is evidence not heretofore referred to, that Respondent had done the same thing in the past. Specifically, it had similarly transferred Roberto Barajas in 1996. Second, even though the Union held majority status in April 1997 (and even though Respondent may have been refusing to acknowledge that status), the decision was not a change which affected the bargaining unit as a whole. It was designed to improve the skills and capabilities of one individual based upon a rather singular determination. The Board has long held that a deviation from policy involving only one individual does not implicate Section 8(a)(5), unless the change affects the unit as a whole. See *Mike O' Connor Chevrolet-Buick-G.M.C.*, supra; *Brown & Connelly Inc.*, 237 NLRB 271, 280 (1978); *Haynes-Trane Service Agency*, 259 NLRB 83, 89 (1981).

Shortly after the initial transfer of April 7, the Union demanded that Estrada be returned to the night shift. Yet, oddly, because he was transferred back to the night shift (whether as a response to the Union's demand or simply because the training period was over) the General Counsel alleges the return transfer also to be a violation of the Act. As the "correction" cures the first supposed transgression, I fail to see the logic behind the second allegation. If that logic is designed to attack Respondent's authority to transfer employees as it sees fit, it is based upon the mistaken assumption that it was a change from a dif-

ferent policy. Yet, the evidence clearly shows that its transfer of Estrada was consistent with its past practice. Accordingly, no change ever actually occurred. Thus, for both reasons, the fact that no change has been demonstrated and even if it had, it affected only one individual on a temporary basis, no violation can be made out. Accordingly, the entire complaint in Case 20–CA–27756–1 should be dismissed.

D. The December Separation of Four of the Barajas Brothers

I have discussed above the issues relating to the correction of social security numbers which occurred in May and June 1996. It should be recalled that on May 23, the Social Security Administration had advised Respondent that 10 percent of its employees had incorrect social security numbers and, as a result, Respondent began investigating that problem. It sent letters to a number of individuals whose social security numbers did not match the range which the Social Security Administration said they must. One of those individuals had been Vicente Medina. Medina had been released in order to give him an opportunity to correct whatever social security number problem he had. He had returned with a facially valid card with a correct number and had been put back to work on in late August 1996. However, shortly thereafter the Auburn, Washington office of the Social Security Administration mailed Medina a memo in care of Respondent in which it stated, "Our record shows that the social security number you are using doesn't match our records. The Federal criminal code provides a penalty of a fine of not more than $10,000 or imprisonment of not more than 15 years or both. Please get this taken care of immediately." This letter was reviewed by Respondent's business office personnel, and Medina was immediately suspended on September 20. Unlike the earlier suspensions, the Medina suspension did not draw an unfair labor practice charge. It may have been due to the timing, occurring in September, or it may have been because Medina was not a union activist or because he had been absent during the height of the organizational campaign. He also worked for the sauna side of the Company, although he was in the bargaining unit.

Respondent remained aware that it needed to continue to pursue the question, raised by the May SSA letter, concerning the validity of the social security numbers. It had placed a lower priority on that concern during the height of the election campaign as Respondent had decided that NLRB matters required a higher priority. After Medina was suspended, however, the social security number question did not immediately return to the top of the Respondent's administrative concerns. Even so, the investigation remained uncompleted.

Sometime in early October, John Kolkka gave the office instructions to resume the investigation. Social security and employment matters relating to IRCA were normally handled by bookkeeper Sherry Jones, but in this instance, apparently because it was time consuming, the duties fell to Williamson. Williamson discovered that checking the social security numbers was more difficult than expected. The Social Security Administration had provided a toll free hotline but she could only check six numbers per telephone call. She first started with the top of the alphabet which included Aguilar and the five Barajas Brothers. When the brothers did not check out she thought perhaps there might be a problem with the Hispanic practice of utilizing the mother's maiden name as a surname and checked them again. Aguilar's number had been cleared the first time and on the second occasion, Octavio Barajas' number was cleared. At that point she decided to talk to the local office of the Social Security Administration.

She conferred with the manager of the Redwood City SSA office, Diana Y. Thomas. Eventually, on December 11 Williamson sent a list of four names together with their dates of birth and social security numbers to that SSA office. These were Francisco Barajas, Moises Barajas, Roberto Barajas, and Sergio Barajas. She says that she sent their names because they were the first alphabetically and that these particular employees "seem to have some anomaly that would bear checking."

Thomas replied by fax on December 16 stating that she had received the request for the verification of four employees' social security numbers. She went on to say "each of these clients need to come to Social Security concerning their numbers."

Simultaneously, on December 16, the Board remanded the representation case challenged ballots to the Regional Director for counting. The count was scheduled for December 31.

On December 30, Respondent handed each of the four Barajas brothers a letter which stated the following:

> We have been notified by the Social Security Administration as of 16 December 1996 that the above social security number that you furnished us with is an invalid number.
>
> In order for you to continue your employment with this firm, you must contact the local social security office and obtain a *written verification* of your valid social security number (emphasis in original).

On the following day the Regional Office of the Board completed counting the ballots and issued a revised tally showing the Union to have obtained majority status.

On January 14, 1997, Respondent, through Butters, wrote each of the four saying:

> On 30 December 1996 we requested you to contact the Social Security Administration to verify your eligibility to work at Kolkka Tables. Since that date you have not satisfied your obligation in this regard. Therefore, we can no longer consider you an employee of our company. If your current status changes, please do not hesitate to contact us.

On December 31, 1996, the Union filed the unfair labor practice charge alleging that the Barajas Brothers had been discharged because of their union activities. The Regional Office investigated that matter and determined that the facts warranted the issuance of a complaint. Respondent thereupon ceased investigating the validity of the social security numbers of its remaining employees.

There are a number of concerns here which are at cross current. These include the prima facie case which the General Counsel has clearly made out, the confluence of NLRA and SSA/IRCA concerns as well as simple credibility questions regarding Respondent's denial that it instituted social security number checks because of employee union activity or that it specifically singled out the Barajas brothers for special treatment.

First, it is clear that the General Counsel has indeed made out a prima facie case that Respondent separated Francisco Barajas, Moises Barajas, Roberto Barajas, and Sergio Barajas from employment because of their union activist status. There is no doubt of their union activity, that Respondent was aware of it and had committed sufficient acts to warrant the conclusion that it harbors union animus. However, the principal question here is whether or not under the *Wright Line* doctrine,[31] Respondent has offered evidence which rebuts that prima facie case and demonstrates that it would have proceeded as it did even without antiunion considerations. In my view, Respondent has succeeded in rebutting the prima facie case.

The General Counsel does not seem to understand the significance and importance of the statute relating to the determination of eligibility for employment in the United States. In its brief, it passes off the significance of social security numbers and cards as an unnecessary document. In this regard it observes that the I-9 form required by the Immigration and Naturalization Service under IRCA does not require the use of a social security card. That document, according to the General Counsel, only lists the social security card as one of the optional documents which an applicant for employment may present. That significantly misstates reality.

A review of the I-9 form demonstrates the point. An employee is deemed eligible for employment under IRCA when he or she presents either a list A document or two documents from lists B and C. List A documents are not of concern here but are a U.S. passport, certificate of U.S. citizenship, certificate of naturalization, unexpired foreign passport with attached employment authorization or alien registration card with photograph (a green card). List B documents are essentially official identification cards such as a driver's license, while list C documents demonstrate employment eligibility such as original social security cards, birth certificates or an unexpired INS authorization, of which there are several varieties. List A documents are conclusive, but the vast majority of United States citizens do not possess them. Therefore, most persons utilize a combination of lists B and C documents. The most common combination is a state issued driver's license (ID card) and an original social security card. The reason the social security card is preferred over a birth certificate is because the number is required in an employment context in order to fill out the proper income tax documentation.

Thus, when the Social Security Administration notifies an employer that an employee has presented a social security card with a false number, it is an instant alert to the employer that the I-9 form is probably false and that the employee has failed to demonstrate his eligibility for employment in the United States.

Furthermore, when the General Counsel asserts that other documents may be used which would qualify as a list C document, it is treading on thin ice. Another section of IRCA prohibits an employer from insisting upon specific documents. If an employer insists upon specific documentation, it is committing a violation of Section 8 U.S.C. § 1324b(a)(6) of IRCA, a violation known as "document abuse discrimination." It is a practice which is specifically barred by law.[32] See *Getahun v. OCAHO*, 124 F.3d 591 (3d Cir. 1997) for a judicial discussion of this statute. Therefore, the General Counsel's observation that the social security card is not required not only misses the mark but suggests that the employer should have insisted upon some other documentation. That suggestion is misplaced and would lead an employer to violate IRCA. Accordingly, the General Counsel's argument here is somewhat naive.

Not only does the employee commit a crime by presenting false documents, it can subject the employer to serious criminal liability as well as civil liability as described in section C2 above. An employer *must* be alert to the false document problem and it must respond to it reasonably promptly. Moreover, there is a general obligation on an employer's part, imposed by IRCA, to conduct periodic reviews of that documentation, particularly those documents which have expiration dates. Thus, an employer is under a constant duty to be certain that its employees are actually entitled to work in the United States. Presentation of a false document is a serious matter and the General Counsel's attitude toward that obligation does not give IRCA the respect which it deserves. Respondent was correct to respond to the Social Security Administration's May letter and correct in resuming that task in October. In fact, it may have been operating improperly under INS procedures by instituting the hiatus between June and October.

It is obvious that Respondent resumed its inquiry into the validity of the social security cards in October based upon a legal obligation to do so. Unfortunately, the Social Security Administration procedures were cumbersome and slow, complicated by the cultural circumstance of Hispanic individuals sometimes not using the surname which they may legally carry. Instead, they often use their mother's maiden name as their surname. Williamson made several efforts with the SSA to verify those first six employees, but she did not want to cause their discharge because she was afraid that they had simply been careless in the names which they had used. From her point of view, all of these individuals had presented documentation which appeared to be genuine. She was on the front line and did not wish to hastily declare these individuals to be noncitizens ineligible for employment in the United States, at least not without the imprimatur of a Federal agency.

Eventually, when the Social Security Administration on December 16 gave her that imprimatur, Respondent was obligated to act. Its response was reasonably quick (allowing for the bad news to arrive after Christmas) and relatively tempered. It simply barred the employees from continuing to work until they

[31] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982): approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[32] The INS handbook for employers describes the document abuse prohibition in part 4. It states based upon 8 U.S.C. § 1324b(a)(6):

> Employers cannot set different employment eligibility verification standards or require that different documents be presented by different groups of employees. Employees can chose which documents they want to present from the list of acceptable documents. An employer cannot request that an employee present more or different documents than are required or refuse to honor documents which on their face reasonably appear to be genuine and to relate to the person presenting them.

had presented proper documents. This treatment was no different from what it had required in June. In January 1997, when it wrote the second letter, it continued to offer them employment upon the presentation of proper documentation.

The Barajas brothers never did correct their social security numbers. Clearly, an individual who fails to meet the legal obligation of providing proper documents to demonstrate their right to be employed cannot reasonably expect to remain employed. Nor can the Board expect an employer, attempting to follow those laws, to continue to employ that individual.

I am aware the General Counsel also contends that Respondent knew at all times that these were individuals who were not eligible for employment in the United States. From that "fact" it wishes to argue that these individuals were not truly discharged because of their status as illegal aliens, but because of their union activities. There are several problems with this argument. The first is that the General Counsel has failed to present credible evidence that Respondent actually knew that the Barajas brothers were undocumented aliens (or perhaps falsely documented aliens).

That argument is undercut rather significantly by the fact that Octavio Barajas was properly documented and was not discharged. Second, there are three witnesses upon whom the General Counsel relies to support its claim that Respondent knew it employed individuals who were not eligible to work in the United States. The first is Cortez' evidence that he had heard Stephanie Kolkka (in 1990 or 1991) tell two persons to get some money from the bookkeeper to obtain proper documentation. I have previously discredited Cortez and I do not credit him here. He was convicted of a felony for selling illegal drugs (usually a deceitful activity) and he threatened "to get" Mrs. Kolkka. His testimony may well be his means of doing so. Moreover, even if she directed employees to obtain proper documentation, and offered financial support for that objective, it is not clear that she was doing anything unlawful. Some INS documentation requires fees to be paid. It would be a stretch to conclude that Cortez' testimony means anything at all. The second person who gave such testimony is Moises Barajas. He testified first that on June 7 Stephanie Kolkka told him, through translator Pedraza, that he should get another social security card. He later embellished saying she told him to "buy" a new social security card. Curiously, he omitted this conversation from his NLRB investigative affidavit. That is, in my opinion, a significant omission, lending credence to a charge of recent fabrication. Once the issue became clear to him, it was easy to see that his case is advanced if the General Counsel can prove Respondent's prior knowledge of his illegal status. I conclude his testimony that Stephanie Kolkka told him to "buy" a new social security card is not credible. The embellishment is too convenient. The third individual is union organizer Luis Solares. He testified that John Kolkka, in a fury over some insubordination, referred to the entire staff as individuals "without papers." On its face that sounds unlikely. Why would John Kolkka or any employer who employed illegal aliens, say such a thing to a nonconfidante and opponent such as Solares. It is entirely improbable. Furthermore, although Solares testified in English, he has a good deal of difficulty with the language. There is room for a major misunderstanding on the point.

Accordingly, I am unable to conclude that the evidence presented here leads to a finding that Respondent purposefully hired undocumented individuals or kept them employed after discovering their undocumented status. I hesitate to make a finding on the point one way or the other, however, for I am aware that the Immigration and Naturalization Service has issued a notice of inspection to Respondent which is currently in abeyance pending the outcome of this matter. My observation here is that the General Counsel has not presented sufficient evidence for such a finding. This issue is, of course, collateral to issue of whether the individuals were fired reasons prohibited by the National Labor Relations Act and not essential to my analysis here.

The finding which I do make is that despite the fact that these individuals had engaged in union activity, the evidence is conclusive that their lack of verifiable documents was the actual reason which Respondent used in its decision to let them go. Accordingly, I find that Respondent has met its burden under *Wright Line*. It would have taken the steps it did whether or not they had engaged in any union activity and whether or not Respondent is guilty of unfair labor practices demonstrating union animus elsewhere. Accordingly, I conclude that this allegation in the complaint should be dismissed.

THE REMEDY

Having found Respondent has engaged in certain unfair labor practices, I find that it should be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, it shall be ordered to cease and desist from interfering with, restraining, and coercing employees from engaging in activity protected by Section 7 of the Act. In addition, it shall be ordered to take certain affirmative action designed to remedy the violations found herein. The affirmative action shall require Respondent to bargain in good faith by immediately providing the Union with any plans Respondent has regarding subcontracting work; a copy of any company policy handbook; a list of current employees, including their wage rates, job classifications, dates of hire, and benefits, and company policies regarding job descriptions, terminations, layoffs, promotions, vacations, sick leave, scheduled pay increases, and merit or bonus pay plans.

As Respondent has discriminatorily discharged its employees Rigoberto Moreno and Guillermo Cortez, it would normally be required to offer them immediate and full reinstatement to their previous jobs, or if those jobs are no longer available, to substantially equivalent jobs and to make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of their discharge to the date of proper offers of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co., 90* NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

However, Respondent argues there are two severe impediments preventing me from applying the usual remedies. The first is that Moreno has claimed disability since the day after he was discharged. The second is because Cortez at the time of the hearing had been incarcerated for committing a criminal act, selling illegal drugs, and cannot be reinstated.

With Respect to Moreno, I find that he is entitled to an offer of reinstatement in the usual fashion, but observe that Respondent is entitled to an offset of backpay for any substantial period of time where he was unable to work. That is a matter which is best left to the compliance stage for full investigation. I do observe that Respondent's obligation to pay backpay would end either at the time a proper offer of reinstatement is made or when a medical opinion has been rendered declaring Moreno permanently disabled, whichever occurs first. *Jenkins Index*, 283 NLRB 457 (1987). I am not certain that the record demonstrates any permanent disability, although a temporary disability may be inferred. An offer of reinstatement is the starting place and I shall direct Respondent to tender such an offer. *Dayton Tire & Rubber Co.*, 227 NLRB 873 (1977). And, Respondent may also inquire, at the compliance stage, regarding issues of Moreno's having withdrawn from the job market.

Cortez is an entirely different matter. He was convicted within a few months of his discharge and sentenced to 3 years in prison. Under Board law he is not entitled to an offer of reinstatement, but is entitled to backpay from the date of his discharge until the date of his conviction. *East Island Swiss Products*, 220 NLRB 175 (1975); cf. *J. P. Stevens & Co.*, 247 NLRB 420 (1980); *NLRB v. Jacob E. Decker & Sons*, 636 F.2d 129 (5th Cir. 1981). Accordingly, I will not direct Respondent to make an offer of reinstatement to him; but shall direct backpay from the date of his discharge to the date of his conviction.

In Moreno's case backpay and interest shall be computed pursuant to the *Woolworth* and *New Horizons for the Retarded* rules. In Cortez' case, due to the short backpay period, the quarterly calculations of *Woolworth* need not be applied, but the interest calculations of *New Horizons* remain applicable. The same is also true for Efrain Ramos Tena's suspension of May 15–17.

In addition, Respondent shall be ordered to remove from its files any reference to its unlawful discharges of Moreno and Cortez, as well as the suspension of Ramos Tena, and to notify them in writing that this has been done and that the discharges/suspension will not be used against them in any way.

And, Respondent will be affirmatively ordered to provide the material which the Union requested in order to begin the collective bargaining process. Because that process has not yet begun, I observe that the certification year based on the certificate of representative which issued in favor of the Charging Party on January 9, 1997, has not yet begun to run and that the obligation to bargain in good faith, remains upon Respondent and will continue to do so until he has complied with the good faith duty imposed upon him by Section 8(a)(5) and 8(d).

Finally, Respondent will be ordered to post a notice to employees advising them of the remedial steps it will take.[33]

Based on the foregoing findings of fact and the record as a whole I hereby make the following

[33] As the Union has been certified as the 9(a) representative after winning the representation election, the notice language dealing with preelection conduct will be modified to avoid the appearance that a second election is in the offing.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning Section 2(2), (6), and (7) of the Act.

2. Carpenters Union Local 2236, affiliated with the Bay Counties District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The concerted refusal to work and walkout of May 10, 13–14, 1996 of Respondent's unrepresented employees were protected by Section 7 of the Act as their purpose was for the mutual aid and protection of employees, specifically to obtain better working conditions relating to the piece rate pay system by which Respondent, in large part, remunerated its employees.

4. In disciplining the employees who engaged in such activity, Respondent violated Section 8(a)(1) of the Act, whether that discipline took the form of warnings, suspensions, or discharges.

5. Respondent's discharge of Rigoberto Moreno and Guillermo Cortez and its suspension of Efrain Ramos Tena on May 15, 1996, for participating in that protected strike were violations of Section 8(a)(1) of the Act.

6. The General Counsel has failed to prove that Respondent discharged Jose Zepeda on May 20, 1996, or that Zepeda's departure was connected to his protected activity. The evidence demonstrates that Zepeda voluntarily resigned.

7. On various dates in July and August, Respondent violated Section 8(a)(1) of the Act during the course of its preelection campaign by:

Threatening to close or move the business in the event the employees selected the Union as their collective bargaining representative.

Threatening to refuse to negotiate a contract with the Union in the event it became the employees' Section 9(a) representative, thereby telling employees that having a collective bargaining agent is a futile act.

Offering employees promotions and/or raises to induce them to abandon their support for the Union and to induce them to persuade employees to vote against union representation.

Threatening employees with unspecified reprisals if they selected the Union as their representative.

Soliciting grievances and thereby impliedly promising to correct them in order to undermine the employees' support for the Union.

Telling employees that they would lose some of their current benefits or suffer wage reductions if the Union became their representative.

8. On August 23, 1996, Respondent, acting through Butters, violated Section 8(a)(1) by telling Efrain Ramos Tena to remove certain Union stickers from his personal property, a privately-owned toolbox.

9. The General Counsel has failed to prove that Respondent suspended Roberto Barajas or Jorge Garcia on August 23, 1996; likewise it has failed to demonstrate that its suspension of Efrain Ramos Tena on that day was for any reason other than insubordination for repeatedly refusing to follow a direct order.

10. The General Counsel has failed to prove that Respondent violated Section 8(a)(3) of the Act when, beginning on December 30, 1996, and thereafter, it refused to allow Francisco Barajas, Moises Barajas, Roberto Barajas, and Sergio Barajas to continue to work until they presented valid documents demonstrating their right to be employed in the United States.

11. The General Counsel has failed to prove that Respondent transferred its employee Moises Estrada on April 7, 1997, from the night shift to the day shift because of his union activities or sympathies; it has therefore failed to prove that such conduct violated Section 8(a)(3) of the Act. Likewise it has failed to demonstrate that such transfers breached the bargaining obligation.

12. Respondent violated Section 8(a)(5) of the Act by unilaterally, and without notice to the Union, in late August 1996, changing the release time of its paychecks on Fridays from 2 to 4:30 p.m., thereby preventing its night-shift employees from being able to negotiate their paychecks before they began work, a significant change in their working conditions.

13. Respondent violated Section 8(a)(5) of the Act when beginning on January 3, 1997, repeated on February 27, 1997, it refused to provide to the Union, after the Union had requested on those dates, certain relevant information necessary to the performance of its duties as the 9(a) representative of its employees. That information related to: plans Respondent had regarding subcontracting work; a copy of any company policy handbook; a list of current employees, including their wage rates, job classifications, dates of hire, and benefits; and company policies regarding job descriptions, terminations, layoffs, promotions, vacations, sick leave, scheduled pay increases for 1997, and merit or bonus pay plans.

14. The General Counsel has failed to prove any remaining allegations of the complaint where violations have not been specifically found.

[Recommend Order Omitted from publication.]